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**In the
Supreme Court of the United States**

OCTOBER TERM, 1975

LOUIS A. MARKERT,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT**

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*To: The Honorable, The Chief Justice and Associate
Justices of the Supreme Court of the United States.*

Petitioner, Louis A. Markert, prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Seventh Circuit reversing an order of suppression of his grand jury testimony and subsequent statements to government attorneys and investigators; all pursuant to grand jury subpoena, which testimony and statements were in response to inquiries by the federal executive or grand jury, and related directly to

petitioner's acts performed during his tenure as a legislator and member of the Illinois General Assembly, and all such questioning and answers given in response thereto relative to his functions and the functions of other representatives in the legislative process.

OPINIONS BELOW

The Opinion of the United States District Court for the Northern District of Illinois, Eastern Division, in *United States v. Craig, et al.*, No. 74 Cr. 877 is not officially reported but is printed in the Appendix to this Petition (App. A, pp. 1-10). The first opinion of the United States Court of Appeals for the Seventh Circuit reversing the Order of Suppression under the same title, No. 75-1592 of that Court, was entered on January 5, 1976, and is officially reported at 528 F. 2d 773 and, also, is printed in the Appendix hereto (App. B. pp. 11-33).

A Petition for Rehearing and a Suggestion for Rehearing En Banc¹ was, with extensions of time granted, timely filed by the government.²

¹Though the relief of reversal prayed by the Government was granted, the majority of the original panel found a common-law privilege to exist in Petitioner on the basis of his position as a member of the General Assembly of the State of Illinois. The minority opinion concurred in the result, but found no privilege in federal criminal cases. It was on the basis of the majority's finding of a Common-Law privilege, that the Government sought and was accorded Rehearing En Banc.

²A petition for Rehearing filed by your petitioner within the fourteen day limitation was denied. A Petition for Writ of Certiorari contesting the "waiver" portion of the decision was filed in this Court, under number 75-1225 and was resisted by the Government on the grounds that it was premature (without addressing the merits), while the respondent's Petition for Rehearing was still pending in the Court below. This Court denied the Petition on May 19, 1976.

Rehearing En Banc was granted by the Seventh Circuit. The second opinion of the United States Court of Appeals for the Seventh Circuit, again reversing the order of suppression was entered on July 9, 1976, and is not yet officially reported but is printed in the Appendix hereto. (App. C, pp. 34-36).

JURISDICTION

The first decision of the United States Court of Appeals was filed on January 5, 1976 (App. B). The second decision of that Court was filed July 9, 1976 (App. C). This Petition is filed within 30 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the Majority below creates a federal-state constitutional imbalance, in denying recognition to the Speech or Debate provisions of the Constitution of the State of Illinois; offends the Tenth Amendment; and is contrary to applicable decisions of this Court.
2. Whether a state constitutional guarantee to its lawmakers under its "Speech or Debate" clause, which is in complete harmony with that of the federal constitution, can be obliterated by a Federal Rule of Evidence.
3. Whether the Court below correctly equated common law executive and judicial immunity with State constitutionally granted legislative privilege, and, on that basis, denied application of the immunity to criminal proceedings.
4. Should this Court agree that a Federal Rule of Evidence does not overcome State Constitutional provisions nor common-law immunities, has there been waiver within the contemplation of law and applicable authority?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 6, Clause 1, United States Constitution

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

Article 6, Clause 2, United States Constitution

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Article IV, Section 12, Illinois Constitution of 1970

Except in cases of treason, felony or breach of peace, a member shall be privileged from arrest going to, during, and returning from sessions of the General Assembly. A member shall not be held to answer before any other tribunal for any speech or debate, written or oral, in either house. These immunities shall apply to committee and legislative commission proceedings.

Rule 26. Rules of Criminal Procedure

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court.

Rule 501. Federal Rules of Evidence

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

STATEMENT OF THE CASE

This case originated by the filing of an indictment in two counts against petitioner, a former member of the Illinois General Assembly and two present members, (plus an unindicted co-conspirator also a legislator) under the provisions of Title 18 U.S.C. § 1951, and § 1341.

Under the terms of the Indictment, at all times pertinent thereto, this petitioner was a duly elected member of the House of Representatives of the State of Illinois (Para. 1) and of the Seventy-Eighth General Assembly, "entrusted and vested by reason of his office with the legislative power of the State of Illinois." (Para. 2)

It is, further, alleged in Count I that he, and three others, did "conspire to use the power and authority vested in them by reason of their office as members of the House of Representatives to unlawfully obtain and cause to be obtained property. . . ." (Para. 5)

Paragraph 3 of Count I describes the alleged victims of the scheme as being defrauded of this petitioner's "loyal, faithful and honest services in their official positions as members of the House of Representatives . . ." (sub-para. a), and of the alleged victims' right to honest and lawful conduct of the legislative business of the State. (sub-para. b)

The scheme as alleged in Paragraphs 4 through 8, describes the introduction of House Bill 2025; the postponement of consideration of that Bill; conferring with a registered lobbyist about paying money for the stopping of the passage of the Bill, and soliciting the same, and causing the tabling of said Bill.

Together with moving (ultimately unsuccessfully) to dismiss the indictment as violative of the Speech or Debate Clause of the United States Constitution (Art. I, §6) and of the State of Illinois (Art. IV, §12), this petitioner also moved to suppress statements he made to inquiries put to him by the office of the United States Attorney before the Grand Jury, pursuant to Grand Jury subpoena and less formally (but still with the understanding that statements made were under the command of the subpoena) to such attorneys and to federal agents.

On the occasions referred to in the Motion to Suppress, petitioner was clearly advised of his privilege against self-incrimination under the Fifth Amendment. He did not invoke that right. When he moved for suppression, he did so on the basis that he had no knowledge of whatever rights he might have in his legislative capacity concerning his legislative functions. His counsel admitted he was not advised, because counsel herself was not aware, and the government admitted it only informed him of his fifth amendment rights. (Common Law Record, Doc. 56).

On March 13, 1975, the trial judge, Alfred E. Kirkland, of the Northern District of Illinois, in a memorandum opinion, ruled on defendants' motion to dismiss. He found that "the Speech or Debate Clause of the United States Constitution has never been nor should it now be extended to the states," but that, "when a defendant enters a federal courtroom he is [not] stripped of all state endowed constitutional privileges," determining that the Illinois Speech or Debate provision was applicable to a federal criminal trial. On the correlative question of whether the prosecution could proceed in the face of the privilege, he answered affirmatively because "[e]xtortion and mail fraud are in no conceivable way part of the legislative process," and because in that court's view, it was unnecessary "to inquire into the legislative process in the course of prosecution."

Four days after its opinion on the motion to dismiss, the Court entered an order with respect to petitioner Markert's motion to suppress on Speech or Debate grounds. The order, noting that the Illinois Speech or Debate privilege precluded the government "from inquiring into legislative acts or defendant's motives in performance of legislative acts," directed petitioner to identify precisely what evidence was gathered in violation of his state constitutional privilege.

In response Petitioner filed a statement in which he identified certain grand jury testimony and three different interviews with postal inspectors and government attorneys as the object of his motion to suppress. (O.R. 52). Government counsels' responsive pleading asserted the position that "a state privilege, constitutional or otherwise, cannot bar the use of any evidence in any federal criminal proceeding"; and took the government's alternative position in the form of a waiver argument. (O.R. 53).

On May 23, 1975, the district court held that "it would defeat the purpose of the Illinois Speech or Debate Clause if an individual legislator could waive a protection which was personal to him"; found "that the privilege is not personal to a legislator and may not be waived," and suppressed various portions of Markert's preindictment statements. (App. A. 8-10)

Under the provisions of 18 U.S.C. §3731, which sanctions interlocutory governmental appeals from orders suppressing evidence the government obtained a review by the Seventh Circuit.

The original panel of three judges of that Court concurred in reversing the suppression order. The majority rejected the principle that the Speech or Debate Clause of the Illinois Constitution, nonetheless found its equivalent in a "federal common-law speech or debate privilege applicable in federal criminal prosecutions." It also found this equivalent reinforced by principles of federal-state comity. (528 F.2d at 773-74). It nonetheless found waiver of the privilege by Markert, based on this Court's never finding "that the failure to inform the defendant of a privilege unrelated to trial fairness mandates a finding that the decision was not voluntary." (528 F.2d at 781). The minority opinion, while concurring, found it unnecessary to reach the question of waiver, because unless there is an underlying immunity, there can be no evidentiary privilege. It found that common-law official immunity does not extend to liability under federal criminal statutes, that immunity from civil liability suffices to "promote independence and fearless discharge of duty on the part of the affected official." (528 F.2d at 782-3).

Thereafter, the government petitioned for rehearing³ and suggested rehearing *en banc* on the basis that

"The case presents an issue of first impression: whether there is a speech or debate privilege under the federal common law of evidence which exceeds the official immunity afforded state legislators from liability under federal law for acts done in their legislative roles. We believe that this issue, which has broad implications, requires consideration by the entire Court because, as envisioned by Fed.R.App.P. 35(a), an *en banc* determination is essential to resolve a question of exceptional importance."

Rehearing *en banc* was ordered before the eight active sitting judges.⁴ After such rehearing, the majority joined the special concurring opinion that

"... the protection afforded state legislators under the federal law for acts done in their legislative roles is based on the common law doctrine of official immunity, the privilege is commensurate with the immunity, and since the immunity does not extend to criminal liability neither should the privilege." (App. C. p. 35)

Judge Cummings, the author of the original majority opinion, adhered to his prior expressed views. (App. C, p. 35)

Chief Judge Fairchild expressed the view that "the Constitutional relationship between the States and the United

³ Petitioner's Petition for rehearing by the Seventh Circuit was denied, and his Petition for Certiorari to this Court denied, the latter apparently on the basis that it was premature.

⁴ Judge Robert L. Kunzig of the Court of Claims, who sat by designation on the original panel and joined in the majority holding, was ineligible to join the Court sitting *en banc*.

States requires federal courts to recognize and honor the Speech or Debate Clause of the Illinois Constitution, but that petitioner, by not invoking it, had waived." (App. C, p. 36).

Judge Swygert (former Chief Judge) agreed with the reasoning of the majority on the original panel that the common-law privilege extended to these criminal proceedings, but would affirm "because he believes the privilege was not waived." (App. C, p. 36)

REASONS FOR GRANTING THE WRIT

This Court should issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review the decision herein on the following grounds:

1. The majority opinion of the Court below that the Speech or Debate Clause of the Illinois Constitution, will not be honored in Courts of the United States is contrary to the concept of pluralism, which is basic to our federalistic form of government, and violates the reserved power provisions of the Tenth Amendment.

One member of the Court below sitting en banc stated the proposition succinctly, but forcefully:

"Chief Judge Fairchild is of the view that the constitutional relationship between the states and the United States requires federal courts to recognize and honor the Speech or Debate Clause of the Illinois Constitution, . . ." (App. 36).

This question is neither academic nor episodic. Nor is it peculiar to the State of Illinois. Most of the fifty states have expressly incorporated speech or debate provisions applicable to their legislators into their several constitutions.⁵ It presents a far-reaching inquiry into, and an anomaly of, the interpretation of a federal evidentiary rule, enacted pursuant to the laws of the United States, which were enacted pursuant to the Constitution of the United States, nullifying a privilege created under a State

⁵ There is, thus, no resultant confusion and complexity the motivation of the House Committee in enacting Rule 26 (now Section 501), which would emerge from conflicting diverse state constitutional provisions on the subject. Cf. H. Rep. No. 2492, 76th Congress, 3rd Sess. 2 (1940).

constitution, which State privilege is in complete harmony with the federal constitutional privilege, and which nullification seeks authority in the supremacy clause of the federal constitution.

Each state has the power to order its own affairs, except so far as the federal constitution has withdrawn that power. The powers of the federal government are not self-generating but proceed from the people of the States. That is the principle of the Tenth Amendment that powers not so delegated "are reserved to the states respectively." See also *United States v. Darby*, 312 U.S. 100.

Although the federal government and the states co-exist territorially, each is supreme in its sphere. The preservation of each are within the principles of federalism; a concept of an indestructible union of indestructible states. The maintenance of the authority of the states over purely local matters is an essential to that concept. Although, as here, a particular provision of federal law may be facially applicable to a given set of circumstances, its controlling effect is limited by the essential powers of government reserved to the states. Particularly appropriate are the words of this court recently in *National League of Cities v. Usery*, 44 LW 4974, at 4980: "Congress may not exercise that power [to regulate commerce] so as to force directly on the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made."⁶

⁶ This concept was recognized by the majority in the first decision:

"The Hobbs Act (18 U.S.C. §1951) and the Mail Fraud Statute (18 U.S.C. §1341) are not narrowly drawn attempts by Congress to regulate the conduct of state legislators. These statutes therefore provide no compelling federal interest which requires us to consider whether the privilege may be abrogated by Congress." (App. 22, fn.4)

The most integral government function of a state is its law-making. That integral function carries with it a state constitutional protection of Speech or Debate. The decision of the majority presents an alarming question: When the States, and particularly the State of Illinois, ceded to the United States whatever power the federal government has, did that ceding imply a right of state constitutional amendment or repeal? We submit that, where there is complete philosophical harmony between the state constitution and the federal constitution, any answer must emphatically be negative. Mutual respect and equality would dictate and require the Illinois constitution be honored.

It also presents a secondary question: When the United States Congress approved the Illinois Constitution in 1818, and it was on the basis of that Constitution Illinois was admitted into the union, did that not amount to a contract of mutual respect in the absence of an articulated collision?

It is inconceivable that the Congress concealed from the State of Illinois that the State's constitutional guarantees (here Speech or Debate) would be negated under clauses 3 and 7 of Section 8, Article I, Constitution of the United States (the mail and interstate commerce powers). See fn. 6, *supra*.

The minority opinion of the Court below rejected the concept that the supremacy clause dictates the result reached by the majority.

"This argument ignores the federal nature of the American system of government. The Constitution confers upon the national government only limited powers. Those powers not granted remain within the domain of the separate states. The reservation of power for the states is not only the import of the Tenth Amendment but also a basic understanding of the draftsmen of the Constitution. 'The proposed Con-

stitution, so far from implying an abolition of the State governments * * * leaves in their possession certain exclusive and very important portions of sovereign power. This fully corresponds, in every rational import of the terms, with the idea of a federal government.' The Federalist, No. 9 at 76 (New American Library Ed. 1961).

"The role of the states under the new federal constitution was also a central issue in the ratification debates. Opponents claimed that the new national government would soon engulf the states, eliminating all of their power and control over local affairs. See II Elliot's Debates, *supra* at 308 (New York), at 469 (Pennsylvania); 111 Elliot's Debates, *supra* at 171 (Virginia). Yet in state after state speakers arose to assure their fellow delegates that the Constitution would work no such change; the states would remain an important unit of the government. See II Elliot's Debates, *supra* at 168 (Massachusetts), at 199 (Connecticut); IV Elliot's Debates, *supra* at 316 (South Carolina). The Constitution creates a federal system of government; people are subject to two sets of laws, those of the national government and those of the states. The essence of this federal structure is that on matters of national importance, the Congress shall legislate; on matters of local concern, the state legislatures shall enact the laws. See The Federalist No. 38, *supra*; Grant, The Nature and Scope of Concurrent Power, 34 Columbia L. Rev. 995 (1934). Therefore, state legislatures acting within the scope of their powers perform a function as vital to the governance of the state as the role Congress fulfills with regard to the nation as a whole."

(App. A. 20-21)

The minority also recognized that principles of federal-state comity as defined by this Court, demand a proper respect for state functions, citing *Younger v. Harris*, 401 U.S. 37, 44. That "proper respect" which would be gen-

erally accorded cannot logically be said to evaporate because the United States is the prosecutor, and the action takes place in United States courts. It is, in fact, by definition, to such parties that the principles address themselves and should be peculiarly accommodated: The United States on one hand, state legislators on the other.

It is to just such an accommodation that the minority addressed itself. Borrowing from this Court's recognition of a common-law doctrine of official privilege related in *Tenney v. Brandhove*, 341 U.S. 367, it held that privilege to insulate this petitioner, and his co-defendants, from inquiry into their legislative functions and the reasons for their performance of those functions in the manner in which they were performed.

While the determination of the minority would accomplish the same end as an official recognition of the protections of the provisions of the Illinois Constitution, we submit that mutual respect of co-equal sovereigns dictates that the charter of those sovereigns be accorded mutual recognition.

2. The decision of the majority below that state legislators are not protected in any measure against prosecutions by the federal government either by their own respective state constitutions nor any common law privilege, is inconsistent with this Court's decisions applicable to the question.

The majority of the Court below, when sitting en banc, conformed to an opinion that official immunity is unitary, applying to all branches of government within equal bounds, regardless of the purposes which are intended to be served by that immunity. It, thus, confines that immunity as to these legislators only to civil liability. It recognizes that a more extensive protection is accorded fed-

eral legislators,⁷ but excuses the extension of such protection to state legislators on the basis that the more extensive federal protection is based on "an additional, more fundamental purposes grounded in the separation of powers in the federal government." (App. 30).

The minority⁸ recognized the majority decision reflected

⁷ The government has conceded that "[if] this case involved the prosecution of a federal congressman, the district court's decision . . . would be concededly correct" as to the protection under Speech or Debate. (Government's Brief on Appeal, p. 5)

⁸ The minority's analysis of the now-majority opinion is a self-explanatory critique:

"⁵ The concurring opinion argues that because state legislators have no official immunity from federal criminal prosecutions, they should likewise have no privilege. But the evidentiary privilege conferred on members of Congress follows not from any substantive immunity but from the Speech or Debate Clause itself. A member of Congress is not immune from prosecution on charges of bribery or conflict of interest. *United States v. Brewster*, *supra*; *United States v. Johnson*, *supra*. Yet the prosecutor is prohibited from attempting to prove those offenses by questioning the congressman about the motives for his legislative acts. *Ibid*. The privilege rests on the constitutional judgment that the courts are not deemed the proper place to hold legislators accountable for their acts as elected representatives. *Tenney v. Brandhove*, *supra*, 341 U.S. at 378.

Implicitly, the concurring opinion argues that this principle of government is not applicable here because state legislators have no reason to expect interference in their affairs by a United States Attorney. This argument not only ignores the reality of the case, evidenced by the concession of the United States Attorney at oral argument that Illinois legislators would be inhibited in their official conduct were no privilege recognized; it also disregards the wisdom of the founding fathers, who feared that the federal government would impermissibly intrude upon the power of the states to govern their own affairs. See *Federalist* Nos. 23, 29, *supra*."

(App. 22-23, fn.5)

a conflict with the admonition of this Court in *Tenney v. Brandhove*:

"The clause originated, and its purpose remains, 'to preserve the principle that the legislature must be free to speak and act without fear of criminal and civil liability.' *Tenney v. Brandhove*, *supra*, 341 U.S. at 375." (App. 18)

Tenney was, of course, a civil rights case, arising with respect to the actions of a California legislative committee. California, wherein the action arose, had no Speech or Debate clause embodied in its constitution.⁹ *Brandhove*, claiming to be sorely used by that committee, brought suit under the Civil Rights Act. This Court drew upon "our political history" to its determination of a privilege of legislators of freedom not only from civil process, but "from arrest" (341 U.S. at 372) for what they say or do in the legislature.

The primary purpose of the privilege was clearly enunciated as enabling and encouraging "a representative of the public to discharge his public trust with firmness and success. . . ." Only secondary is separation of powers. Separation of power was no concern in *Tenney*.

We see no logic in the majority's preoccupation with co-equal branches of government as the differential to be considered. The chilling effect of government threat to free exercise of state legislative function (which is the real talisman of Speech or Debate) is as real, or more chilling, than threats by the state. The majority of the original panel gave this practical consideration:

⁹ For this reason, perhaps, and no other reason occurs, this Court later noted that *Tenney* was not a Speech or Debate case. *United States v. Brewster*, 408 U.S. 501, 516, fn. 10.

"The evil is the fact of deterrence; whether the threat emanates from the local or national executives makes no difference." (App. 21)

This court has said precisely the same thing, that "legislators are immune from deterrents to the uninhibited discharge of their legislative duty. . . ." *Tenney v. Brandhove*, 341 U.S. 367, 377. This Court, in no way qualified the source of the deterrent. It continued that it is "not consonant with our scheme of government for a court to inquire into the motives of legislators." It does not qualify the court where it sits nor the form of action before it. This Court also emphasized the greater respect accorded legislative privilege appropriate where "the defendants are members of the legislature." (341 U.S. 367)

The decision of the majority conflicts head-on with this Court's decision in *United States v. Johnson*, 383 U.S. 169. There, too, though under the Federal Speech or Debate clause, the government urged applicability only to civil actions. The Court rejected the urging reminding that the clause "was not born primarily of a desire to avoid private suits, but rather to prevent intimid action by the executive and account ability before a possibly hostile judiciary." (383 U.S. at 181)

An ancillary question is whether the majority is right in its evaluation of legislative common-law official immunity—being on a par with executive and judicial immunity, but significantly less than that which arises by virtue of the Speech or Debate Clause.

The majority decision—in fact, the core of that decision—relies upon a misapprehension of this Court's decisions, and that misapprehension results in misinterpretation. The essence of the decision is:

"Several recent opinions of the Supreme Court have made it clear that the protection afforded state legislators from liability under federal law for acts done in their legislative roles, [is based] . . . upon a common-law doctrine of official immunity. See *Wood v. Strickland*, 420 U.S. 308, 316-318 (1975); *Scheuer v. Rhodes*, 416 U.S. 232, 243-244 (1974); *Doe v. McMillan*, 412 U.S. 306, 318-320 (1973). This is the same doctrine that was applied in *Pierson v. Ray*, 386 U.S. 547, 554-555 (1967), to provide immunity to a judge for acts done in the course of his judicial duties." (App. 28)

From that posture, the majority makes a facile jump to *Braatelen v. United States*, 147 F.2d 888,¹⁰ wherein the Court made some general and loose observations:

"It is true that as a general rule a judge cannot be held criminally liable for erroneous judicial acts done in good faith. 30 Am. Jur., Judges §52. But he may be held criminally responsible when he acts fraudulently or corruptly. . . ."

What the majority overlooked is that the decision continues:

"The sufficient answer to this defense is that Braatelen was not indicted for an erroneous or wrongful judicial act. He is charged with conspiracy to defraud the United States by corruptly administering or procuring the corrupt administration of an Act of Congress. The crime charged is distinct from his official acts. It might have been consummated without the performance of a single judicial act on his part." 147 F.2d 888 at 895.

This is neither more nor less than what this Court said in *Brewster* (*United States v. Brewster*, 408 U.S. 501). It has no relation to inquiry of a legislator in the area pro-

¹⁰ *United States v. Manton*, 2 Cir., 107 F.2d 834, also cited by the Court does not raise the question at all.

tected by Speech or Debate, nor under its common law counterpart.

We submit, the protections accorded the several branches under common law are not to be equated. *Doe v. McMillan*, 412 U.S. 306, on which the majority relies,¹¹ makes it clear that the scope of common-law immunity is not the same for all officers for all purposes. (412 U.S. at p. 319) But more recently, and since the initial decision in this case this Court availed itself of occasion to address the same question in *Imbler v. Pachtman*, 96 S.Ct. 984, where the court noted that distinctions do obtain. First, denominating the position of legislators, the Supreme Court said:

“Regardless of any unworthy purpose animating their actions, legislators were held to enjoy under this statute [civil rights] their usual immunity when acting ‘in a field where legislators traditionally have power to act.’ *Id.*, at 379, 71 S.Ct. at 789.” (96 S.Ct. at 989)

Recognizing a distinction between and among governmental officers, this Court emphasized that consideration of each [such official] was predicated upon a considered inquiry into “the immunity historically accorded the relevant official at the common law and the interests behind it.” (96 S.Ct. at 990)

This is precisely what the minority opinion does, when it says the purpose of the evidentiary principle is the same as that of the substantive aspect, and the privilege must be enforced in a manner that satisfies the purposes for it.

3. The concept of waiver of privilege as applied by the majority of the Court below conflicts with applicable decisions of this Court.

¹¹ *Wood v. Strickland*, 420 U.S. 308 and *Scheuer v. Rhodes*, 416 U.S. 232 are in accord, though not as explicitly.

Only one judge on the en banc panel rejected the contention that former Illinois State Representative Markert had waived his official privilege by not invoking his Fifth Amendment privilege.¹² He does so without further elaboration nor explanation. We contend his rejection is, however, firmly bottomed in the decisions of this Court, and the ruling of the majority that there has been waiver conflicts with those decisions. We make this submission on several grounds:

A. Those members of the court who found waiver misconceived the nature of the right in its determination of “waiver” of Speech or Debate security. This is not a privilege, it is a proscription. The proscription is that the legislator “shall not be questioned” (Art. I, §6, U.S. Constitution); that he “shall not be held to answer” (Art. 4, Section 12, Illinois Constitution, 1970); that “it is not consonant . . . for a Court to inquire” (*United States v. Johnson*, 383 U.S. 169 at 180, Justice Harlan concurring).

It was also stated in *Carter v. Carter Coal Co.*, 298 U.S. 238 that “State powers can neither be appropriated on the one hand nor abdicated on the other.”

It should also be noted that in *United States v. Johnson*, 383 U.S. 169 and in *United States v. Brewster*, 408 U.S. 501, this Court emphasized that in trials the proscription went to the inquiry into legislative acts and the impropriety of evoking response, not whether by responding the law-maker had waived; quoting with approval from *Ex Parte Wason*, 4 Q.B. 573, that law-makers “cannot be inquired into” by criminal proceedings.

¹² The majority, finding no immunity, did not find it necessary to reach the question.

The waiver ruling overlooked the fact that a grand jury subpoena is the inception of criminal proceedings. An "inquiry" at the inception is equally proscribed as an "inquiry" on trial.

B. The waiver determination is in conflict with decisions of this Court holding that waivers of important constitutional rights must be knowingly and intelligently made. The finding (App. 26) that a legislator who waived his privilege against self-incrimination under the Fifth Amendment of the Constitution, also waived his Speech or Debate privilege given him under the Illinois Constitution or under common law, and that "we need not find a knowing and intelligent forfeiture of that right". The decision continued:

"At all times, appellee was represented by counsel and informed of his right to refuse to answer questions by asserting his Fifth Amendment privilege against self-incrimination."

"* * * he gave potentially damaging testimony rather than relying on his privilege against self-incrimination, of which he had been informed. Because he made a conscious choice to testify, he waived the instant privilege."

We further submit to the Court that this finding erroneously presumed knowledge of both petitioner and his counsel. In its decision this Court states:

"Although subpoenaed before the grand jury, Markert was not compelled to testify in violation of any right. See *United States v. Calandra*, 414 U.S. 338, 346; *Kastigar v. United States*, 406 U.S. 441, 448. Because he was a state legislator, knowledgeable in the workings of the Government and represented by competent counsel, his election to testify waived his Speech or Debate clause privilege."

We respectfully submit this is a fact determination that may not be presumed. It is emphatically denied that this presumption is based on any sampling of human experience much less is it a product of unequivocal human experience such as would support the presumption.

In its original decision that this is a waivable right rather than a proscription, it should have remanded for full hearing on petitioner's knowledge of that right, as well as the advice—as well as comprehension—of his counsel at the time of making the statements in issue. Presumption of knowledge, and presumption of intelligent waiver, is contrary to all authority extant.

This is especially so when the district court did not fully explore knowledge and waiver, and never reached any issue thereon, it having been guided by its holding of absolute proscription of executive or judicial inquiry.

C. The finding of waiver completely misconceives this court's unexplained footnote in *Gravel v. United States*, 408 U.S. at 622, n.13. The way the footnote is described as follows:

"This analysis is consistent with the Supreme Court's note in *Gravel v. United States*, *supra*, 408 U.S. at 622 n. 13, that a Senator can waive his aide's claim of privilege. If so, the Senator, and Markert in this case, should similarly be able to waive his own privilege. The courts have often held that evidentiary privileges may be waived by the involved individual." (App. 25)

The decision of this Court in *Gravel* cannot in any wise be taken to authorize any implied waiver. *First this Court was adamant that the legislator could not be questioned at all.* As to his aide, this Court did not contemplate any implied waiver. It said, in unmistakable terms that the

insulation had first to be "repudiated."¹³ Repudiation negates any implied waiver. It imports knowledge and affirmative rejection. On the state of this record it can no way be suggested petitioner "repudiated" that of which he did not know, his counsel did not (at the time) know, and the government did not advise him (because it, too,

¹³ The full text of this Court's decision in *Gravel v. U.S.*, 408 U.S. at 622 n. 13 is as follows:

"[12-15] The United States fears the abuses that history reveals have occurred *when legislators are invested with the power to relieve others from the operation of otherwise valid civil and criminal laws*. But these abuses, it seems to us, are for the most part obviated if the privilege applicable to the aide is viewed, as it must be, as the privilege of the Senator, and invocable only by the Senator or by the aide on the Senator's behalf,¹³ and if in all events the privilege available to the aide is confined to those services that would be immune legislative conduct if performed by the Senator himself. *This view places beyond the Speech or Debate Clause a variety of services characteristically performed by aides for Members of Congress, even though within the scope of their employment. It likewise provides no protection for criminal conduct threatening the security of the person or property of others, whether performed at the direction of the Senator in preparation for or in execution of a legislative act or done without his knowledge or direction*. Neither does it immunize Senator or aide from testifying at trials or grand jury proceedings involving third-party crimes where the questions do not require testimony about or impugn a legislative act. Thus our refusal to distinguish between Senator and aide in applying the Speech or Debate Clause does not mean that Rodberg is for all purposes exempt from grand jury questioning.

"¹³ It follows that an aide's claim of privilege can be *repudiated* and thus waived by the Senator."

Emphasis ours.

did not know). The implied waiver relying on this Court's decision in *Gravel*, ignores this Court's articulation of repudiation as necessary thereto—even in the case of an aide. We are not dealing with an aide. We are dealing with an integral element of the legislature itself.

CONCLUSION

Wherefore, for the above and foregoing reasons, it is respectfully prayed that this Court will issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

ANNA R. LAVIN
EDWARD J. CALIHAN, JR.
Attorneys for Petitioner
Louis A. Markert

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

UNITED STATES OF AMERICA,

v.
ROBERT CRAIG, et al.,

Plaintiff,

Defendants.

No. 74 CR 877

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on motion by defendant Markert to suppress evidence. Defendant, a former member of the Illinois General Assembly, argues that certain evidence, including grand jury testimony, was taken from him in violation of the Illinois Speech or Debate Clause. This evidence was submitted to the Court for *in camera* inspection.

Defendant agreed to several interviews and testified before a federal grand jury. At all relevant times defendant was represented by counsel and was given a standard warning concerning his constitutional rights. The government asserts that the Speech or Debate privilege is personal in nature and that defendant waived this privilege when he agreed to give testimony after having been advised of his rights. Defendant argues that the privilege is

a complete bar to inquiry which may not be waived by an individual.

The threshold issue is whether the Illinois Speech or Debate Clause accords a personal privilege which may effectively be waived by an individual legislator. This Court is of the opinion that it may not be so waived.

Article 4, Section 12 of the Illinois Constitution of 1970 provides in pertinent part that:

... A member [of the General Assembly] shall not be held to answer before any other tribunal for any speech or debate, written or oral, in either house. ...

There is little available case authority pertaining to the Illinois Speech or Debate Clause. Accordingly, since the state and federal privilege have a common historical origin and purpose, the Court will look to those decisions which bear on the federal privilege. The comparable federal privilege is found in Article I, Section 6 of the United States Constitution:

... for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place.

Although the scope of the federal Speech or Debate Clause has been examined at length by the Supreme Court, there has never been a definitive ruling on the issue now before this Court.

In *United States v. Johnson*, 383 U.S. 169 (1966), the Supreme Court was faced with a constitutional challenge to the indictment of a United States Congressman who allegedly had abused his position by conspiring to give a particular speech in return for payment from private interests.

Mr. Justice Harlan noted that: "... the language of the Speech or Debate Clause clearly proscribes at least some of the evidence taken during trial". (383 U.S. at

173) The Court quoted with approval from *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951), stating:

... that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned. (383 U.S. at 180).

The Court reasoned that despite the reprehensible nature of the charged conduct, the Speech or Debate Clause operated to prevent it from being made the basis of a charge relating to legislative acts. The Court observed:

The essence of such a charge is that the Congressman's conduct was improperly motivated, and as will appear that is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry. (383 U.S. at 180)

Because the Court found that the government's case could be made without reference to legislative acts, the indictment itself withstood attack. However, the Court took care to point out that any prosecution dependent on inquiry into legislative activity necessarily *contravened* the Speech or Debate Clause, and the Court directed the government to prosecute its case without reference to such forbidden area of inquiry.

It is significant that nowhere in *Johnson* did the Court suggest that the Speech or Debate privilege was available at the option of a legislator. The opinion reflects the apparent conclusion that the Clause operates to *foreclose judicial inquiry* into legislative activity.

In *United States v. Brewster*, 408 U.S. 501 (1972), the issue before the Court was whether the defendant Senator could be prosecuted on the charge that he had accepted a bribe in exchange for a promise relating to an official act. The Court held that the Speech or Debate Clause operated to bar inquiry into legislative acts, and since such a prose-

cution was not necessarily dependent on such inquiry, prosecution was not barred.

The Court in both *Johnson* and *Brewster* quoted with approval from *Ex Parte Wason*, L.R. 4 Q.B. 573 (1869):

I am clearly of opinion that we ought not to allow it to be doubted for a moment that the motives or intentions of members of either House *cannot be inquired into* by criminal proceedings with respect to anything they may do or say in the House. (emphasis added) (383 U.S. at 183, 408 U.S. at 509).

The language of the Supreme Court opinions and of the constitutional provisions themselves is plain. The privilege is invariably described in the opinions in terms of a prohibition against judicial or executive inquiry. Likewise, the directive in each of the two relevant constitutional provisions is not to the legislator, that he may avail himself of a privilege attendant upon elective office, but rather to those who would question him. It is said that the legislator "*shall not be questioned in any other Place*" and that he "*shall not be held to answer before any other tribunal.*" The plain import of that language is not that the legislator may claim a privilege, but that the executive and judicial branches are prohibited from inquiring into legislative activities.

Such literal interpretation of constitutional language and that of the opinions is entirely consistent with the stated purpose of the Speech or Debate privilege. See *Kilbourn v. Thompson*, 103 U.S. 168 (1880); *United States v. Johnson*, *supra*; *United States v. Brewster*, *supra*.

In *Tenney v. Brandhove*, *supra*, the Court devoted a considerable portion of its opinion to a discussion of the origins and purpose of the privilege. Mr. Justice Frankfurter adopted the statement of James Wilson, a member of the Committee which was responsible for the federal Speech or Debate Clause:

In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of everyone, however powerful, to whom the exercise of that liberty may occasion offense. (341 U.S. at 373)

The Court observed that it was necessary to insure that representatives be able to execute the functions of their office without fear of prosecutions. (341 U.S. at 373, 374) The Court concluded that:

Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence, but for the public good. (emphasis added) (341 U.S. at 377)

This principle was affirmed in *United States v. Johnson*, *supra*, where the Court stated that the purpose of the privilege was to "prevent intimidation by the executive and accountability before a possibly hostile judiciary." (383 U.S. at 181), and again in *Brewster*:

The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators. (408 U.S. at 507)

The Court concludes, upon consideration of the relevant authorities, that it would defeat the purpose of the Illinois Speech or Debate Clause if an individual legislator could waive a protection which was personal to him. It is clear, in the opinion of this Court, based on the plain wording of the Illinois Speech or Debate Clause and on the language of Supreme Court opinions, that the privilege operates as a complete bar to inquiry into legislative activities. The Court holds that the privilege is not personal to a legislator and may not be waived. The Speech or Debate Clause

was designed to protect the legislative process and render it immune from intimidation. The fact that a legislator benefits from its protection does not alter the nature of the privilege.

The judicial or executive branches of government may not avoid this constitutional prohibition by the fortuitous expedient of obtaining the willing cooperation of a legislator, who chooses to volunteer information, thereby creating an inhibiting effect on the legislative activities of other members of the legislature. While there is nothing, as a practical matter, which can prevent a legislator from volunteering information on protected activities, the Speech or Debate Clause prohibits this Court from listening.

The Court having held that the Speech or Debate privilege may not be waived, the next issue for determination is which evidence, if any, was taken from defendant in violation of this privilege.

Looking to those Supreme Court cases which deal with the federal Speech or Debate Clause, certain guidelines have emerged.

In *Kilbourn, supra*, it was held that the privilege should be read broadly, to include not only words spoken in debate, but anything generally done in a session of the House by one of its members in relation to the business before it. (103 U.S. at 204) It was further stated in *Brewster, supra*, that the Speech or Debate Clause prohibits inquiry only into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts. (408 U.S. at 512) The Court there quoted with approval from *Coffin v. Coffin, supra* at 27:

... and I would define the article as securing to every member exemption from prosecution, for everything

said or done by him, as a representative, in the exercise of the functions of that office; without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules. (408 U.S. at 514)

In *Gravel v. United States*, 408 U.S. 606 (1972) the Court clarified the scope of the privilege, by stating that committee reports, resolutions, and the act of voting are equally covered.

As was made clear in *Brewster*, however, not all things "related to the due functioning of the legislative process" are shielded by the Clause. (408 U.S. at 513, 515). Thus, political activities must be distinguished from legislative activities.

To the extent that criminal activity is not part of the legislative process, it is not protected. This was the holding of the Supreme Court in *Johnson, supra*. The Court there stated:

No argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no way related to the due functioning of the legislative process. (383 U.S. at 172)

This proposition was affirmed in *Brewster, supra*, where Mr. Chief Justice Burger, speaking for the Court, observed:

Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. It is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator. It is not an 'act resulting from the nature, and in the execution, of the office.' Nor is it a 'thing said or done by him, as a representative, in the exercise of the functions of that office,' 4 Mass., at 27.

Nor is inquiry into a legislative act or the motivation for a legislative act necessary to a prosecution under this statute or this indictment. When a bribe is taken, it does not matter whether the promise for which the bribe was given was for the performance of a legislative act as here, or as in *Johnson*, for use of a Congressman's influence with the Executive Branch. And an inquiry into the purpose of a bribe 'does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them.' 383 U.S., at 185. (408 U.S. at 526)

The Court has carefully examined the transcript of defendant's grand jury testimony, as well as memoranda of three interviews conducted by postal inspectors and the United States Attorney's office.

Exhibit One is identified as a transcript of defendant's grand jury testimony. The Court is of the opinion that the following language is barred by the Speech or Debate Clause:

On page 108, beginning with the question, "Are you familiar with . . ." through and including, on page 109, the answer, "To my recollection, no."

Beginning on page 110, with the question, "Now you were a sponsor . . .", through and including, on page 113, the answer, "It was sometime . . . the introduction."

Beginning on page 113, with the question, "And prior to that time . . .", through and including, on page 114, the answer, ". . . no, I have no recollection."

Beginning on page 115, with the question, "And you are aware, are you not . . .", through and including, on page 116, the answer, "I am, yes."

On page 122, beginning with the question, "Did you ever discuss . . .", through and including the answer, "I would assume . . . I would assume I did."

Beginning on page 128, with the question, "Did you talk . . .", through and including, on page 129, the answer, "No; I was . . . service to the G.A."

On page 133, from the question, "Did you discuss . . ." through and including the answer, "I'm certain . . . can't say."

Exhibit Two is identified as a memorandum of an interview of defendant which was conducted on September 2, 1973 in rural Mt. Sterling, Illinois by two postal inspectors. The Court is of the opinion that the following language is barred by the Speech or Debate Clause:

Beginning in paragraph 2 of page 2, "Mr. Markert was then asked who was . . ." through and including, in paragraph 1 of page 3, ". . . sponsored that particular bill."

On page 3, "Markert stated that Pappas would . . . Department of Highways, etc."

On page 4, "Mr. Markert then recalled . . . guarantee the outcome of this legislation."

On page 4, "Markert was asked if . . . and other legislative business."

On page 5, "He stated that the majority . . . legislation on individual bills."

On page 5, "Markert related that . . . information on original bills."

On page 5, "When asked if this type . . . was not commonplace either."

On page 5, "Pappas stated that . . . relating to this bill."

On page 6, "Markert said at no time . . . any of the principles involved."

Exhibit Three is identified as a memorandum of a conversation which occurred on September 20, 1973 in Spring-

field, Illinois, between defendant and a member of the United States Attorney's office. The Court finds nothing within this memorandum which is privileged under the Speech or Debate Clause.

Exhibit Four is identified as a memorandum of an interview of defendant which was conducted on November 19, 1974 in Chicago, Illinois by a postal inspector and a member of the United States Attorneys' office. The Court is of the opinion that the following language is barred by the Speech or Debate Clause:

All of paragraph 3 of page 2, "Mr. Holderman asked . . . Doris Steinberg about the bill."

In paragraph 4 of page 3, "He stated that he . . . would be assigned to him."

In paragraph 4 of page 4, "He said that he probably . . . interested in this bill."

In paragraph 4 of page 5, "Again, he stated that . . . or even kill it."

Order to be entered in accordance with this opinion.

Enter: /s/ *Alfred Y. Kirkland*
Alfred Y. Kirkland, Judge

Dated: May 23, 1975

APPENDIX B

In the
United States Court of Appeals
For the Seventh Circuit

No. 75-1592

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

ROBERT CRAIG, THOMAS J. HANAHAN and
LOUIS A. MARKERT,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.

No. 74 CR 877

ALFRED Y. KIRKLAND, *Judge*

Argued September 26, 1975 — Decided January 5, 1976

Before CUMMINGS and TONE, *Circuit Judges*, and KUNZIG, *Judge*.*

CUMMINGS, *Circuit Judge*. In December 1974, appellee Louis A. Markert, and co-defendants Robert Craig and Thomas J. Hanahan were indicted on two charges of

* Judge Robert L. Kunzig of the United States Court of Claims is sitting by designation.

political corruption. Count One alleged that while members of the Illinois House of Representatives they and their unindicted co-conspirator Pete Pappas allegedly extorted \$1500 from members of the Illinois Car and Truck Renting and Leasing Association, inducing the payments "under color of official right" in violation of the Hobbs Act (18 U.S.C. § 1951). Count Two charged that the same individuals engaged in a scheme to defraud the citizens of Illinois of their "loyal, faithful and honest services in their official positions" and "of their right to have the legislative business of the State of Illinois conducted honestly" by accepting \$1500 to block passage of a certain bill. The scheme was said to violate the Mail Fraud Statute (18 U.S.C. § 1341).

During the grand jury's investigation of alleged corruption in the Illinois General Assembly, the appellee consented to interviews with postal inspectors in September 1973 and to an interview with postal inspectors and an Assistant United States Attorney in November 1974. In addition, he testified under subpoena before the grand jury on September 13, 1973. At all times, appellee was represented by counsel and informed of his right to refuse to answer questions by asserting his Fifth Amendment privilege against self-incrimination. He declined, however, to invoke this privilege and answered all questions put to him by the postal inspectors, Assistant United States Attorney and before the grand jury.

In February 1975, Markert moved to suppress his grand jury testimony and the other statements he gave to government agents on the ground that they were obtained from him in violation of the federal and state Speech or Debate Clauses. A few weeks later, the district judge ruled that Markert was entitled to the protection of the privilege accorded by the Speech or Debate Clause of the

Illinois Constitution.¹ Consequently, the district court ordered Markert to provide "a concise written statement of what evidence, if any, was taken from him in violation of his [Illinois] constitutional privilege."

Subsequently, the district court handed down an unreported memorandum opinion and order granting Markert's motion to suppress certain portions of his grand jury testimony and parts of the interviews he gave to postal inspectors and the Assistant United States Attorney. The court decided that a legislator could not waive the privilege accorded by the Speech and Debate Clause of the State Constitution and "that the executive and judicial branches are prohibited from inquiring into legislative activities." The Government has appealed pursuant to 18 U.S.C. § 3731.

The primary question is whether state legislators have a Speech or Debate privilege, conferred either by the Illinois Constitution or as a matter of federal common law, which bars the admission of certain evidence against state legislators in a federal criminal prosecution. If so, we must then decide whether Markert waived that privilege.

I

The Federal Rules of Evidence became effective July 1, 1975.² Rule 501 is the pertinent rule and provides as follows:

¹ In pertinent part, Article 4, Section 12, of the Illinois Constitution of 1970 provides:

"* * * A member of the [General Assembly] shall not be held to answer before any other tribunal for any speech or debate, written or oral, in either house. * * *"

² Under *United States v. McCarthy*, 445 F.2d 587, 590-591 (7th Cir. 1971), this Court has applied these rules even before their effective date.

"Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

This version of Rule 501 does not alter the pre-existing criminal law in the federal courts. The standard embodied in the first sentence of Rule 501 was derived from Rule 26 of the Federal Rules of Criminal Procedure. See Senate Report No. 93-1277, 93rd Cong., 2d Sess., 4 U.S. Code, Cong. & Admin. News 7051, 7058 (1974); House Report No. 93-650, 93rd Cong., 2d Sess., 4 U.S. Code, Cong. & Admin. News 7075, 7082 (1974). Rule 26 provided:

"The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."³

This rule was promulgated in 1944 (effective in 1945) as part of the Federal Rules of Criminal Procedure. Prior to those rules, the law of evidence to be applied in federal

³ After the Federal Rules of Evidence were adopted in 1975, Rule 26 was amended to provide as follows:

"In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court."

criminal cases was uncertain. See Howard, Evidence in Federal Criminal Trials, 51 Yale L. J. 763 (1942). Neither state law nor federal law clearly applied. The governing statute, the Rules of Decision Act, provided that "the laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in Courts of the United States, in cases where they apply" (1 Stat. 92, now 28 U.S.C. § 1652). As interpreted by the Supreme Court, the statute required the federal courts in a criminal case to apply the law of the state in which the trial was held as it existed in 1789. *United States v. Reid*, 53 U.S. 361, 363. If the state was admitted to the Union after 1789, the common law as of the date of admission controlled. *Logan v. United States*, 144 U.S. 263, 303. These principles, however, were not strictly followed. At times, the Supreme Court examined state laws of evidence in the light of "general authority and sound reason," rejecting them where they were antiquated or inappropriate. *Benson v. United States*, 146 U.S. 325, 335; see *Rosen v. United States*, 245 U.S. 467. Finally in *Funk v. United States*, 290 U.S. 371, and *Wolfle v. United States*, 291 U.S. 7, the Court abandoned any strict adherence to state rules of evidence in criminal cases, adopting instead a flexible standard which would allow the federal courts to modify or disregard local laws of privilege "in the light of reason and experience." 291 U.S. at 12. These two cases were the basis for Rule 26. See Advisory Committee Notes to Rule 26; Vanderbilt, New Rules of Criminal Procedure, 29 A.B.A.J. 376, 377. Under Rule 26 the federal courts were free to fashion a federal law of evidence consistent with the Federal Rules of Criminal Procedure and Congressional statutes. See *Elkins v. United States*, 364 U.S. 206, 216; Cummings, The

Third Adventure, 29 A.B.A.J. 654, 655. As the 1940 Criminal Rules Enabling Act (18 U.S.C. § 3771) provided in pertinent part:

“All laws in conflict with such rules [of criminal procedure] shall be of no further force and effect after such rules have taken effect.”

The House Committee Report on Section 3771 showed that its purpose was to render it unnecessary to “search the common law, statutes, and constitutional provisions of the States * * *” (H. Rep. No. 2492, 76th Cong., 3d Sess., 2 (1940)), in determining the admissibility of evidence in criminal cases. Thus Rule 26 envisioned that the admissibility of evidence in criminal cases in federal courts would be governed by federal law and would not be dependent upon diverse state laws, including state constitutional provisions. *Elkins v. United States*, *supra*, 364 U.S. at 216; *Heathman v. United States District Court*, 503 F.2d 1032, 1034 (10th Cir. 1974).

Similarly, Rule 501 contemplates that “federal privilege law applies in criminal cases.” Conference Report No. 93-1597, 93rd Cong., 2d Sess., 4 U.S. Code, Cong. & Admin. News 7098, 7100 (1974). However, nothing in the language of the rule or its legislative history indicates that courts are prohibited from recognizing as a matter of federal common law a speech or debate privilege for state legislators. The legislative history of Rule 501 was indeed stormy. The Supreme Court Advisory Committee’s draft contained nine non-constitutional privileges (56 F.R.D. 234-256), and its proposed Rule 501 provided that only the enumerated privileges and those required by the federal Constitution or Act of Congress need be recognized by the federal courts (56 F.R.D. 230). This draft of Article V on Privileges aroused such furor when the Supreme Court submitted it to Congress that the House

Committee on the Judiciary eliminated the nine privileges in favor of the present Rule 501. This was done because the rules as submitted to Congress “contained controversial modifications or restrictions upon common law privileges.” Senate Rep. No. 93-1277, *supra*, 4 U.S. Cong. & Admin. News 7058 (1974). With this background, surely there would have been a hint in the history of revised Rule 501 if Congress had intended to override the common law privilege inherent in the Speech or Debate Clause of the federal and state constitutions.

These rules mandate that we neither categorically reject nor accept the defendant’s claim of a speech or debate privilege. Rather, we are instructed to determine whether “the principles of the common law * * * in the light of reason and experience” dictate the recognition of a federal common law speech or debate privilege to be applied in federal criminal prosecutions of state legislators. We hold that Markert has such a privilege.

A product of the 17th century struggle for parliamentary supremacy, legislative freedom of speech and debate “was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation.” *Tenney v. Brandhove*, 341 U.S. 361, 372. The Speech or Debate Clause of the federal Constitution was adopted at the constitutional convention without discussion or dissent. See V Elliot’s Debates 406 (1836 ed.); II Records of the Federal Convention 246 (Farrand ed. 1911). Most states have incorporated similar provisions in their constitutions. See *Tenney v. Brandhove*, *supra*, 341 U.S. at 373-375. And in its most recent cases, the Supreme Court has reaffirmed that the Speech or Debate clause is an essential tenet of the American political system. See *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491; *Doe v. McMillan*, 412 U.S. 306; *Gravel v. United States*, 408 U.S. 606; *United States v. Brewster*, 408 U.S. 501.

The clause originated, and its purpose remains, "to preserve the principle that the legislature must be free to speak and act without fear of criminal and civil liability." *Tenney v. Brandhove*, *supra*, 341 U.S. at 375. It is immaterial that the legislator may have had an unworthy motive. As Justice Frankfurter in *Tenney* (at 377):

"Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good."

This protection of the legislature's independence applies whether the judicial proceeding is civil or criminal. The privilege developed in England in response to the King's seditious libel prosecutions of dissident members of Parliament. See *United States v. Johnson*, *supra*, 383 U.S. at 181-183. Similarly, the Supreme Court has held that the clause applies to criminal prosecutions of members of Congress. *United States v. Brewster*, *supra*; *United States v. Johnson*, *supra*. The express purpose of the clause is to protect legislators "against possible prosecution by an unfriendly executive and conviction by a hostile judiciary" for their acts as legislators. *United States v. Johnson*, *supra*, 383 U.S. at 179. The clause therefore contains substantive and evidentiary elements. The content of a legislator's speech on the floor of the chamber or comment in Committee room cannot be made the basis of either civil (*Doe v. McMillan*, *supra*, 412 U.S. at 312; *Powell v. McCormack*, 395 U.S. 486, 502-503; *Dombrowski v. Eastland*, 387 U.S. 82, 85; *Tenney v. Brandhove*, *supra*, 367 U.S. at 377; *Kilbourn v. Thompson*, 103 U.S. 168, 203) or criminal liability. *Gravel v. United States*, *supra*, 408 U.S. at 624; *United States v. Brewster*, *supra*, 408 U.S. at 514; *United States v. Johnson*, *supra*, 383 U.S. at 180. Nor may legislators be required to answer questions about

their legislative activities. *United States v. Brewster*, *supra*, 408 U.S. at 525; *United States v. Johnson*, *supra*, 383 U.S. at 183. In *Johnson*, the Court approved the English rule that "the motives or intentions of members of either House [of Parliament] cannot be inquired into by criminal proceedings with respect to anything they may do or say in the House." 383 U.S. at 183, quoting *Ex parte Wason*, L.R. 4 Q.B. 573, 577 (1869). Although construed broadly to protect any activity "generally done in a session of the House by one of its members in relation to the business before it" (*United States v. Johnson*, *supra*, 383 U.S. at 179; *Kilbourn v. Thompson*, *supra*, 103 U.S. at 204), the privilege does not apply to a criminal proceeding which "does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them." *United States v. Brewster*, *supra*, 408 U.S. at 510; *United States v. Johnson*, *supra*, 383 U.S. at 185.

Only the evidentiary aspect of the speech or debate privilege is involved in this appeal. Markert contends simply that he cannot be required to answer questions put to him by the grand jury and government officials if the inquiry delves into his conduct as a legislator on matters before the Illinois General Assembly. This evidentiary privilege is a necessary prophylactic. *United States v. Johnson*, *supra*, 383 U.S. at 182. Its purpose is the same as that of the substantive aspect of the Speech or Debate Clause: preservation of the independence of the legislature. *Id.*

The Government does not challenge this construction of the speech or debate privilege. It concedes that were it attempting to prosecute a member of Congress, he would enjoy the privilege Markert asserts in this case. The Government contends however that the privilege should

apply only to questioning of legislators by co-equal branches of government. The policy served by the privilege, the Government argues, is separation of powers; because the national government is supreme, the privilege is inapplicable in this case.

This argument ignores the federal nature of the American system of government. The Constitution confers upon the national government only limited powers. Those powers not granted remain within the domain of the separate states. The reservation of power for the states is not only the import of the Tenth Amendment but also a basic understanding of the draftsmen of the Constitution. "The proposed Constitution, so far from implying an abolition of the State governments * * * leaves in their possession certain exclusive and very important portions of sovereign power. This fully corresponds, in every rational import of the terms, with the idea of a federal government." The Federalist, No. 9 at 76 (New American Library Ed. 1961).

The role of the states under the new federal constitution was also a central issue in the ratification debates. Opponents claimed that the new national government would soon engulf the states, eliminating all of their power and control over local affairs. See II Elliot's Debates, *supra* at 308 (New York), at 469 (Pennsylvania); III Elliot's Debates, *supra* at 171 (Virginia). Yet in state after state speakers arose to assure their fellow delegates that the Constitution would work no such change; the states would remain an important unit of the government. See II Elliot's Debates, *supra* at 168 (Massachusetts), at 199 (Connecticut); IV Elliot's Debates, *supra* at 316 (South Carolina). The Constitution creates a federal system of government; people are subject to two sets of laws,

those of the national government and those of the states. The essence of this federal structure is that on matters of national importance, the Congress shall legislate; on matters of local concern, the state legislatures shall enact the laws. See The Federalist No. 38, *supra*; Grant, The Nature and Scope of Concurrent Power, 34 Columbia L. Rev. 995 (1934). Therefore, state legislatures acting within the scope of their powers perform a function as vital to the governance of the state as the role Congress fulfills with regard to the nation as a whole.

Although the speech or debate privilege embraces notions of the separation of powers among co-equal branches of government, its primary message is that legislatures must be able to discharge their lawful responsibility in an atmosphere free from the threat of interference by other governmental units. A legislator in considering whether to support or oppose a proposed law must be free to reflect on the merits; he must not be deterred from advocating a position by the threat of prosecution by a hostile executive. The evil is the fact of deterrence; whether the threat emanates from the local or national executive makes no difference.

In the present case, the United States Attorney commendably conceded at the oral argument that a refusal to recognize a speech or debate privilege for state legislators would have an inhibiting effect on the conduct of members of the Illinois General Assembly. This threat to the legislature's independence is fundamentally inconsistent with the idea of legislative action reflected in the policy, purpose and history of the privilege and inherent in the words: "for any Speech or Debate in either House, they shall not be questioned in any other Place." U.S. Const. Art. 1 § 6. Deterring a legislator from advancing a point of view,

or influencing how he votes by requiring him to explain his motives before a grand jury is precisely the evil the speech or debate privilege intends to prevent. The protection of the First Amendment does not ameliorate this threat to legislative independence. The protection of freedom of speech does not provide a privilege against giving evidence. *Branzburg v. Hayes*, 408 U.S. 665. It does not prohibit a jury from questioning the motives of the speaker. See *New York Times Co. v. Sullivan*, 376 U.S. 254. Therefore, it would not be an adequate substitute for the speech or debate privilege. Thus, in view of the purposes of the speech or debate privilege, its common law history, and the important role of the states in governing the country, we hold that state legislators are entitled to a federal common law speech or debate privilege applicable in federal criminal prosecutions. The privilege is simply too important to our conception of government to be abolished by judicial fiat in a federal criminal prosecution under a statute of general applicability.⁴ The concurring opinion herein incorrectly, we believe, assumes that the existence of this privilege is dependent on any underlying immunity.⁵

⁴ The Hobbs Act (18 U.S.C. § 1951) and the Mail Fraud Statute (18 U.S.C. § 1341) are not narrowly drawn attempts by Congress to regulate the conduct of state legislators. These statutes therefore provide no compelling federal interest which requires us to consider whether the privilege may be abrogated by Congress.

⁵ The concurring opinion argues that because state legislators have no official immunity from federal criminal prosecutions, they should likewise have no privilege. But the evidentiary privilege conferred on members of Congress follows not from any substantive immunity but from the Speech or Debate Clause itself. A member of Congress is not immune from prosecution on charges of bribery or conflict of interest. *United States v. Brewster*, *supra*; *United States v. John-*

(Footnote continued)

Principles of federal-state comity—"a proper respect for state functions" (*Younger v. Harris*, 401 U.S. 37, 44)—reinforce our conclusion that this particular privilege was not rescinded by the Federal Rules of Evidence. Perhaps somewhat idealistically, the Court in *Tenney v. Brandhove*, *supra*, 341 U.S. at 378, stated that legislative abuses were to be corrected by self-discipline and the electorate. Subsequently, in *United States v. Brewster*, *supra*, 408 U.S. at 520, the Court more prudently noted that not only the "jurisdiction of Congress to punish its Members is not all-embracing," but also that the power of self-discipline has inherent limits. Here, however, the State of Illinois is under no such disabilities. While it is within the province of the United States Attorney to prosecute local officials who violate federal law, the primary responsibility for ferreting out their political corruption must rest, until Congress directs otherwise, with the State, the political unit most directly involved. Federalist No. 17, *supra* at 120. Admittedly, legislators may

(Footnote continued)

son, *supra*. Yet the prosecutor is prohibited from attempting to prove those offenses by questioning the congressman about the motives for his legislative acts. *Ibid*. The privilege rests on the constitutional judgment that the courts are not deemed the proper place to hold legislators accountable for their acts as elected representatives. *Tenney v. Brandhove*, *supra*, 341 U.S. at 378.

Implicitly, the concurring opinion argues that this principle of government is not applicable here because state legislators have no reason to expect interference in their affairs by a United States Attorney. This argument not only ignores the reality of the case, evidenced by the concession of the United States Attorney at oral argument that Illinois legislators would be inhibited in their official conduct were no privilege recognized; it also disregards the wisdom of the founding fathers, who feared that the federal government would impermissibly intrude upon the power of the states to govern their own affairs. See Federalist Nos. 23, 29, *supra*.

abuse their freedom of debate and discussion. But the common law history of the privilege in England and the United States teaches emphatically that it is better to tolerate the potential abuses than to risk the harm to our system of government that would result from inhibiting a legislator's discharge of the responsibility conferred upon him by the electorate. Our decision today does nothing more than recognize that important judgment.

II

Having determined that Markert enjoys a common law speech or debate privilege, we must now determine whether he waived its protection. The Speech or Debate clause is intended to provide a personal safeguard for the individual legislator and an institutional immunity for the legislature itself. *United States v. Brewster*, *supra*, 408 U.S. at 507; *United States v. Johnson*, *supra*, 383 U.S. at 179. This dual protection follows from the belief that the legislature's independence is predicated upon the independence of its members. *Tenney v. Brandhove*, *supra*, 341 U.S. at 377. As long as the individual legislator can perform his function free from the threat of judicial and executive interference, the policy of the privilege is not offended. It therefore follows that to the extent the inquiry impugns only the personal independence of the legislator and does not call into question the independence of other members of the body, the protection of the speech or debate privilege can be waived.

In a criminal prosecution, a state legislator has a right under the due process clause to put into issue his own conduct as a representative if relevant. See *United States v. Nixon*, 418 U.S. 683, 711; *Washington v. Texas*, 388 U.S. 14, 19. Once introduced, the prosecution must be permitted to respond. Recognition of a privilege means

that some relevant evidence will not be before the trier of fact. Because of the policies supporting the privilege, the courts are willing to tolerate this "derogation of the search for truth." *United States v. Nixon*, *supra*, 418 U.S. at 709. However, it is a far more severe, and we believe impermissible, distortion of that process to admit evidence without affording the other party a chance to respond, or to hear testimony without permitting the opposition to cross-examine. This is fundamentally inconsistent with the view that "the two-fold aim [of criminal justice] is that guilt shall not escape or innocence suffer." *Berger v. United States*, 295 U.S. 78, 88. Once the legislator has chosen to make his conduct an issue, the court's interest that its processes not be subverted outweighs the claim of privilege. See *Branzburg v. Hayes*, *supra*.

This analysis is consistent with the Supreme Court's note in *Gravel v. United States*, *supra*, 408 U.S. at 622 n. 13, that a Senator can waive his aide's claim of privilege.⁶ If so, the Senator, and Markert in this case, should similarly be able to waive his own privilege. The courts have often held that evidentiary privileges may be waived by the involved individual. *E.g.*, *United States v. Pauldino*, 487 F.2d 127 (10th Cir. 1973), certiorari, denied,

⁶ The defendant contends that this footnote means that the Senator could simply acknowledge to the court that the aide was not acting as his agent. If so, the footnote is extraneous because the privilege would not apply. Therefore, it seems likely that the Court meant a Senator could require his aide to testify about actions which, if done by the Senator, would be within the scope of the privilege. Since the aide and the Senator are considered one for the purposes of the privilege (*Gravel v. United States*, *supra*, 408 U.S. at 616), the Senator must be able to waive the protection of the clause for himself as well as his aide.

415 U.S. 981; *United States v. Moorman*, 358 F.2d 31 (7th Cir. 1966), certiorari denied, 385 U.S. 866; *Johnson v. United States*, 270 F.2d 488 (9th Cir. 1959), certiorari denied, 362 U.S. 924. The essence of a waiver is voluntary conduct. A decision to forego the protection of a privilege, to be valid, must be a free choice, and hence presents no challenge to the independence of the legislator.⁷ Markert has not shown why his privilege should not be waivable as long as the waiver is limited to his own conduct.

In deciding whether Markert waived his privilege in this case, we need not find a knowing and intelligent forfeiture of the right. See *Johnson v. Zerbst*, 304 U.S. 458, 464; *United States v. Escander*, 465 F.2d 438, 441 (5th Cir. 1972); *United States v. Michael*, 426 F.2d 1067, 1069 (7th Cir. 1970). The lesser standard of voluntariness applies because the policy served by the privilege is not related to the fairness of the trial. *Schnekloth v. Bustamonte*, 412 U.S. 218, 242. Under the test of voluntariness, it need be shown only that the testimony is the "product of an essentially free and unconstrained choice by its maker." *Schnekloth v. Bustamonte*, *supra*, 412 U.S. at 225; *Columbe v. Connecticut*, 367 U.S. 568, 602. The question

⁷ Because the Speech or Debate clause embodies institutional as well as personal protection, the scope of the waiver must be carefully limited. The difficulty is that the individual legislator's testimony and other evidence may involve not only his conduct but also that of the body as a whole. At that point the law is clear that "the Speech or Debate Clause clearly proscribes at least some of the evidence." *United States v. Johnson*, *supra*, 383 U.S. at 173. A clear threat to the institution's ability to function would be presented if members knew that one of their colleagues, by waiving his privilege, could raise doubts in the minds of grand jurors about the propriety of their conduct. Thus any waiver must be strictly limited to the conduct of the individual representative.

is the defendant's subjective state of mind, to be determined after an examination of all the facts and circumstances. *Schnekloth v. Bustamonte*, *supra*, 412 U.S. at 249; *Kelly v. Peyton*, 420 F.2d 912, 914 (4th Cir. 1970).

Markert contends that the facts of this case indicate that the decision to testify was not freely made. The heart of his argument is that he was not informed of his right to claim a speech or debate testimonial privilege either by the Government or by his own counsel. However, the Supreme Court has never held that the failure to inform the defendant of a privilege unrelated to trial fairness mandates a finding that the decision was not voluntary. *Schnekloth v. Bustamonte*, *supra*, 412 U.S. at 227; accord, *Byrd v. Lane*, 398 F.2d 750, 755 (7th Cir. 1968), certiorari denied, 398 U.S. 1020. When he appeared before the grand jury, he gave potentially damaging testimony rather than relying on his privilege against self-incrimination, of which he had been informed. Because he made a conscious choice to testify, he waived the instant privilege. Although subpoenaed before the grand jury, Markert was not compelled to testify in violation of any of his rights. See *United States v. Calandra*, 414 U.S. 338, 346; *Kastigar v. United States*, 406 U.S. 441, 448. Because he was a state legislator, knowledgeable in the workings of the Government and represented by competent counsel, his election to testify waived his Speech or Debate clause privilege.

The order of suppression is reversed and the cause is remanded for further proceedings consistent herewith.

TONE, *Circuit Judge*, concurring. I concur in the result. I agree with the court that the speech or debate clause of the Illinois Constitution is inapplicable in this

federal criminal proceeding, and that the question to be decided is whether the federal common law of evidence includes the privilege asserted. I disagree, however, with the court's view that, absent waiver, the defendant could claim a speech or debate privilege under the federal common law of evidence.

Several recent opinions of the Supreme Court have made it clear that the protection afforded state legislators from liability under federal law for acts done in their legislative roles, see *Tenney v. Brandhove*, 341 U.S. 367 (1951), is not based upon the speech or debate clause of the Federal Constitution, see *United States v. Brewster*, 408 U.S. 501, 516 n. 10 (1972), a clause that applies only to Congress, but rather upon the common-law doctrine of official immunity. See *Wood v. Strickland*, 420 U.S. 308, 316-318 (1975); *Scheuer v. Rhodes*, 416 U.S. 232, 243-244 (1974); *Doe v. McMillan*, 412 U.S. 306, 318-320 (1973). This is the same doctrine that was applied in *Pierson v. Ray*, 386 U.S. 547, 554-555 (1967), to provide immunity to a judge for acts done in the course of his judicial duties.¹

The speech or debate clause of the Federal Constitution protects members of Congress from being "questioned in any other Place" concerning the Supreme Court was held, "legislative acts or the motivation for actual performance of legislative acts." See *United States v. Brewster*, *supra*, 408 U.S. at 509. The clause provides both immunity from liability and a commensurate privilege against disclosure. *Gravel v. United States*, 408 U.S. 606,

¹ *Tenney v. Brandhove* and *Pierson v. Ray* held that Congress had not intended by adopting the Civil Rights Acts to abrogate the official immunity of legislators and judges, supported as it was by strong tradition and sound reasons.

616 (1972). The privilege against disclosure and the immunity from liability should also be commensurate when the basis for protection is common-law official immunity. Where there is no immunity, it would be incongruous, if not useless, to recognize an evidentiary privilege. Accordingly, I think that whether the claimed privilege should be recognized as a development in the federal common law of evidence depends on whether there is an underlying immunity.

The common-law immunity of state legislators has not been held to be coextensive with that which members of Congress enjoy under the federal speech or debate clause. Even with respect to civil liability, speech-or-debate immunity is broader than official immunity. The former bars injunction actions directed at legislative activities of Congress. *E.g.*, *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975); *Powell v. McCormick*, 395 U.S. 486 (1969). The doctrine of official immunity, on the other hand, has been held by one court not to bar injunctive relief against state legislative activities which offend federal law, *Jordan v. Hutcheson*, 323 F.2d 597 (4th Cir. 1963), and in other cases federal injunctions against state legislative action have been sustained without discussion of the question of immunity. *E.g.*, *Bond v. Floyd*, 385 U.S. 116 (1966); *Bush v. Orleans Parish School Board*, 191 F.Supp. 871 (E.D. La.), *aff'd sub nom. Denny v. Bush*, 367 U.S. 908 (1961).

Unlike federal speech or debate immunity, see *United States v. Johnson*, 383 U.S. 169 (1966), common-law official immunity has not been extended to criminal liability. In *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974), the Court said:

"[W]e have never held that the performance of the duties of judicial, legislative, or executive officers,

requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights. . . . On the contrary, the judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct as proscribed by an Act of Congress. . . .' [Citing *Gravel v. United States*, *supra*, 408 U.S. at 627.]”

Thus judicial officers are not immune from criminal liability for conduct within the scope of their judicial duties. *Braatlien v. United States*, 147 F.2d 888, 895 (8th Cir. 1945); see also *United States v. Manton*, 107 F.2d 834 (2d Cir. 1939). State legislators are similarly subject to federal criminal liability for analogous conduct which falls within the prohibition of a federal criminal statute, as the Court stated in *O'Shea*.

Immunity from civil but not criminal liability has been regarded as sufficient to achieve the purpose of the doctrine of official immunity, which is to promote independence and fearless discharge of duty on the part of the protected officials. While the federal speech or debate clause serves the same purpose, it has an additional, more fundamental purpose grounded in the separation of powers in the federal government. As the Court said in *Gravel v. United States*, *supra*, 408 U.S. at 616, 617:

“The Speech or Debate Clause was designed to insure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch.

. . .

“[T]he central role of the Speech or Debate Clause [is] to prevent intimidation of legislators by the Executive and accountability before a possible hostile judiciary, *United States v. Johnson*, 383 U.S. 169, 181 (1966). . . .”

There being no problem of separation of powers between the federal executive (represented in this case by the United States Attorney) and a state legislature, the Constitution itself does not create an immunity for state legislators as it does for members of Congress. I see no need for the courts to do so either. Nothing in our history or in the authorities relied upon by the court in this case suggests that there is a threat of federal executive interference with the independence of state legislatures that would warrant extending the judicially developed doctrine of official immunity beyond its traditional boundaries. Accordingly, I would hold that the state legislator's official immunity does not extend to liability under federal criminal statutes, and that he therefore has no commensurate official² privilege against disclosure.

In questioning the view that the existence of the privilege should depend upon whether there is a corresponding immunity, the majority states in footnote 5 that “[a] member of Congress is not immune from prosecution on charges of bribery or conflict of interest,” and “[yet] the prosecutor is prohibited from attempting to prove those offenses by questioning the congressman about the motives for his legislative acts,” citing *Brewster* and *Johnson*. This overlooks, I believe, an important distinction made in *Brewster*. As I understand that case, it did not hold that conduct which is not protected by an immunity from liability may nevertheless be privileged from inquiry. *Brewster* was charged with taking bribes in return for being influenced in respect of his official acts and with taking a bribe for an official act already performed by him. The Court held that the speech or debate clause per-

² He has of course the same privilege against self-incrimination that any other citizen has. He has not chosen to assert that privilege in this case.

mitted the government to prosecute those charges, because it could be done without inquiring into "the legislative acts of the defendant member of Congress or his motives for performing them." 408 U.S. at 526, quoting from *Johnson, supra*, 383 U.S. at 185. See also 408 U.S. at 527. The Court said:

"There is no need for the Government to show that appellee fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise.

"Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act." *Id.* at 526.

On the other hand, prosecution for legislative acts and inquiry into those acts or their motives, would have been prohibited by the speech or debate clause. Since bribe taking, however, was not protected by the speech or debate clause, the Court held that "inquiry into [such] activities" was not prohibited by the speech or debate clause. 408 U.S. at 528. In other words, for those acts for which there was no immunity, there was likewise no testimonial privilege. Thus *Brewster* shows that the immunity and the privilege are correlated.

The majority further states in the same footnote that the testimonial privilege for state legislators "rests on the constitutional judgment that the courts are not deemed the proper place to hold legislators accountable for their acts as elected representatives," citing *Tenney v. Brandhove*. I do not believe *Tenney* supports the view that state legislators have a speech or debate immunity derived from the Federal Constitution. See p. 14 above. If they do not, and if I am correct that the doctrine of official immunity leaves state legislators criminally liable under federal law for even their legislative acts, I cannot

believe they are privileged (unless they choose to avail themselves of their fifth amendment right) to withhold testimony concerning acts for which they may be prosecuted.

In reaching the conclusion expressed in this concurring opinion, I have assumed that the Mail Fraud Act (18 U.S.C. § 1341) and the Hobbs Act (18 U.S.C. § 1951) extend to conduct of a state legislator in the performance of his official duties. It would be inappropriate, if not beyond our jurisdiction, to pass on the sufficiency of the indictment in this interlocutory appeal of an order suppressing evidence. *Cf. United States v. Merritts*, F.2d, No. 75-1198, Slip Op. p. 4 (7th Cir. 1975). Moreover, it is unnecessary to consider the scope of those statutes in order to decide this appeal: applying the approach of *Tenney* and *Pierson*, determining whether the doctrine of official immunity shields given legislative conduct is only a preliminary step in resolving the ultimate question of whether Congress intended a statute to apply to that conduct. It is accordingly unnecessary to reach that question in order to decide this case.

A true Copy:

Teste:

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Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 75-1592

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

ROBERT CRAIG, THOMAS J. HANAHAN and LOUIS A. MARKERT,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 74 CR 877

ALFRED Y. KIRKLAND, *Judge.*

ARGUED IN BANC JUNE 7, 1976—DECIDED JULY 9, 1976

Before FAIRCHILD, *Chief Judge*, SWYGERT, CUMMINGS,
PELL, SPRECHER, TONE, BAUER and WOOD, *Circuit Judges.*

PER CURIAM. This interlocutory appeal by the government from an order granting defendant Markert's motion to suppress was originally heard by a panel comprised of Judges Cummings and Tone and Judge Robert L. Kunzig of the United States Court of Claims, sitting by designation. *United States v. Craig*, 528 F.2d 773 (7th Cir. 1976). The facts are set forth in the opinion of the panel majority.

The panel reversed the District Court's order but differed as to the grounds for reversal. All agreed that the existence of a privilege in this federal criminal proceeding was to be determined, not by the Illinois Constitution's Speech or Debate Clause, but by the federal law of evidence. The point of disagreement was whether the federal law of evidence included such a privilege. The majority, in an opinion by Judge Cummings, held that as a matter of federal common law, made applicable by Rule 501 of the Federal Rules of Evidence, Markert, a state legislator, enjoyed a common law speech or debate privilege which shielded him from inquiry into his acts as a legislator or the motives for those acts. The majority held that the suppression order should nevertheless be reversed because Markert, in testifying before the grand jury, had waived his privilege by answering questions concerning privileged matters rather than relying on his privilege. A concurring opinion by Judge Tone agreed with the result on the ground that there was no speech or debate privilege under the federal common law of evidence and did not reach the waiver issue. In summary, the concurring position was that the protection afforded state legislative roles is based on the common law doctrine of official immunity, the privilege is commensurate with the immunity, and since the immunity does not extend to criminal liability neither should the privilege.

After rehearing the case in banc, a majority of the court, Judges Pell, Sprecher, Tone, Bauer, and Wood, are persuaded that the views set forth in the panel concurring opinion are correct, and they vote to reverse on that ground. Judge Cummings adheres to the views set forth in the panel majority opinion, and concurs for the reasons there stated.

Since the reasons supporting the differing views of the in banc majority and concurring judge are fully set forth in the panel opinions, restating those reasons here would serve no purpose. The majority wishes to note, however, that the absence of a privilege has no relationship to the proof necessary to establish a crime involving official corruption; and that although a legislator's voting record and other legislative conduct is not privileged from inquiry it would not, standing alone, support an inference of wrongdoing or improper motive. Proof *aliunde* will be required.

Chief Judge Fairchild is of the view that the constitutional relationship between the states and the United States requires federal courts to recognize and honor the Speech or Debate Clause of the Illinois Constitution, but would hold that the privilege was waived for the reasons stated by the panel majority. Judge Swygert agrees with the panel majority as to the existence of the privilege and the reasons therefor but would affirm because he believes the privilege was not waived.

The order appealed from is reversed, and the case is remanded with directions to overrule the motion to suppress.

A true Copy:

Teste:

*Clerk of the United States Court of
Appeals for the Seventh Circuit*

Supreme Court, U. S.

FILED

NOV 17 1978

MICHAEL RODAK, JR., CLERK

No. 76-179

In the Supreme Court of the United States

OCTOBER TERM, 1976

LOUIS A. MARKERT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals *en banc* (Pet. App. 34-36) is reported at 537 F. 2d 957. The opinion of the panel (Pet. App. 11-33) is reported at 528 F. 2d 773. The opinion of the district court (Pet. App. 1-10) is not reported.

JURISDICTION

The judgment of the court of appeals *en banc* was entered on July 9, 1976. The petition for a writ of certiorari was filed on August 7, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the speech and debate provisions of the Illinois State Constitution create a testimonial privilege

for a state legislator in a federal criminal investigation, and, if so, whether petitioner waived his privilege in the circumstances of this case.

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

The Speech or Debate Clause of the United States Constitution, Article I, Section 6, clause 1, provides in part:

The Senators and Representatives * * * shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

The Supremacy Clause of the United States Constitution, Article 6, Section 2, provides:

This constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Speech or Debate Clause of the Illinois Constitution, Article IV, Section 12, provides in part:

Except in cases of treason, felony or breach of peace, a member shall be privileged from arrest going to, during, and returning from sessions of of the General Assembly. A member shall not be held to answer before any other tribunal for any speech or debate, written or oral, in either house.

* * *

Fed. R. Evid. 501 provides in part:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. * * *

STATEMENT

1. In 1973 a grand jury empaneled in the Northern District of Illinois was investigating alleged corruption in the Illinois General Assembly. Petitioner, a member of the Assembly, consented to be interviewed by federal postal inspectors and an Assistant United States Attorney; in addition, he testified before the grand jury. He did not invoke any privilege arising under either the federal or state constitutions.

In December 1974 petitioner, Robert Craig, and Thomas J. Hanahan were indicted for extortion, in violation of the Hobbs Act, 18 U.S.C. 1951, and for mail fraud, in violation of 18 U.S.C. 1341. Both crimes occurred while they were members of the state legislature. The indictment charged the three defendants with extorting \$1,500 from members of the Illinois Car and Truck Renting and Leasing Association in exchange for helping to block the passage of certain legislation, and with engaging in a scheme to defraud the citizens of the State of Illinois of their "loyal, faithful and honest services in their official positions" and "their right to have the legislative business of the State of Illinois conducted honestly."

In February 1975 petitioner moved to suppress his grand jury testimony and the statements given to the Assistant United States Attorney and the federal postal inspectors. He claimed that these statements had been obtained from him in violation of both the federal and state Speech or Debate Clauses. The United States District Court for the Northern District of Illinois ruled that petitioner was entitled to the protection of the Speech or Debate Clause contained in Article IV, Section 12, of the Illinois Constitution. Concluding that a state legislator could not waive the privilege accorded by the Speech or Debate Clause of the state constitution, the district court suppressed petitioner's statements to both the Assistant United States Attorney and the federal postal inspectors, as well as his testimony before the grand jury.

The government appealed the suppression order.¹ A panel of the court of appeals concluded that federal common law creates a testimonial privilege for statements of state legislators. The court held, however, that petitioner had waived this privilege by voluntarily giving statements to the grand jury and the federal officials. It therefore reversed the suppression order.

Judge Tone concurred in the result. He argued that only the doctrine of "official immunity" might protect state legislators from liability under federal law, that this immunity does not apply to criminal cases, and that where there is no common law official immunity there should be no evidentiary privilege (Pet. App. 27-33).

¹The district court denied petitioner's motion to dismiss the indictment. Accordingly, the only issue before the court of appeals concerned the scope of any testimonial privilege petitioner may have. See Pet. App. 36.

Both petitioner and the government filed petitions for rehearing with suggestions of rehearing *en banc*. The court of appeals granted the government's petition but denied petitioner's.² Five members of the court *en banc* agreed with the views of Judge Tone and voted to reverse the suppression order for that reason (Pet. App. 35). One judge supported the position of the panel (*ibid.*), one judge believed that the "constitutional relationship between the states and the United States requires federal courts to recognize and honor the Speech or Debate Clause of the Illinois Constitution, but would hold that the privilege was waived for the reasons stated by the panel majority" (*id.* at 36), and one judge "agree[d] with the panel majority as to the existence of the privilege * * * but would affirm because he believe[d] the privilege was not waived" (*ibid.*). The suppression order therefore was reversed by a vote of seven to one.

ARGUMENT

1. The abstract arguments advanced by petitioner, touching on the appropriate accommodation of federal and state power, relate to an issue not squarely presented by this case. Petitioner is seeking the suppression of certain statements he voluntarily made to federal officials and before a grand jury. By voluntarily making these statements, petitioner waived whatever testimonial privilege he may otherwise have had. As the Court held in *Garner v. United States*, 424 U.S. 648, a testimonial privilege must be asserted at the time of testimony; except in extraordinary circumstances, a witness who voluntarily makes statements without asserting a privilege cannot later seek to have the statements suppressed as evidence in a federal criminal prosecution.

²Petitioner immediately filed a petition for a writ of certiorari, which was denied on May 19, 1976 (No. 75-1225).

Petitioner asserts that the privilege may not be waived. This argument is incorrect. Although a "speech or debate" privilege exists for the benefit of the legislative process as well as for the benefit of individual legislators, this Court has indicated that the federal privilege may be waived. *Gravel v. United States*, 408 U.S. 606, 622 n. 13. Moreover, petitioner has a right under the Due Process Clause to testify at trial about his legislative speeches and the motivation for his legislative deeds (see *Washington v. Texas*, 388 U.S. 14, 19); the fact that petitioner may proffer such testimony demonstrates that he may waive his privilege. He could waive it as easily by giving a public address concerning his deeds as a legislator; this address could be introduced in evidence. Testimony before a grand jury, and statements to federal officials, should be accorded no different treatment. We therefore submit that the court of appeals correctly decided that petitioner surrendered any testimonial privilege he may have had by voluntarily giving statements. See Pet. App. 24-27.

2. Even if the merits of petitioner's claim of privilege had been properly preserved, there would be no reason for this Court to grant review. There is no conflict among the circuits; the instant case is the first to consider the question. Moreover, the decision of the *en banc* court is correct.

The "Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch." *Gravel v. United States*, *supra*, 408 U.S. at 616. It was intended "to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary * * *." *Id.* at 617; see also *United States v. Brewster*, 408 U.S. 501, 508, 517-518; *United States v. Johnson*,

383 U.S. 169, 181. No similar principle of respect for a coordinate branch of government pertains to federal-state relations. In fact, the Supremacy Clause of the Constitution establishes a contrary principle; federal law is supreme, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

This Court has indicated that the official immunity with which state officials are endowed in civil cases does not extend to criminal cases. Legislative immunity in federal civil rights cases was recognized in *Tenney v. Brandhove*, 341 U.S. 367. But *Tenney* did not recognize a "speech or debate" privilege for state legislators in all federal cases; it is simply one of many examples of official immunity in the federal common law. *United States v. Brewster*, *supra*, 408 U.S. at 516 n. 10; *Doe v. McMillan*, 412 U.S. 306, 319 n. 13. Official immunity does not erect a shield against criminal prosecutions for violations of federal laws.

For example, although judges are immune from federal civil rights liability, they are exposed to prosecution for violations of 18 U.S.C. 242. The Court wrote in *O'Shea v. Littleton*, 414 U.S. 488, 503, that "[w]hatsoever may be the case with respect to civil liability generally * * * or civil liability for willful corruption * * *, we have never held that the performance of the duties of judicial, legislative, or executive officers, requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights. * * * On the contrary, the judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct proscribed by an Act of Congress'" (emphasis added; quoting from *Gravel v. United States*, *supra*, 408 U.S. at 627). Similarly, although prosecutors are immune from federal civil liability, that immunity—

does not leave the public powerless to deter misconduct or to punish that which occurs. This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law. Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U.S.C. § 242 * * *. The prosecutor would fare no better for his willful acts. [*Imbler v. Pachtman*, 424 U.S. 409, 429; footnotes omitted.]

The Illinois Constitution does not apply directly to federal cases. Petitioner could ask for no more than a common law privilege grounded on considerations of comity and the need to shield legislators from harassment and vexation. Yet there is no more reason to extend such a federal privilege to state legislators than there is to extend it to state judges or state prosecutors. *Imbler* and *O'Shea* establish that state judges and prosecutors do not have immunity from prosecution for their criminal acts; state legislators should fare no better. The only arguable reason for creating a testimonial privilege would be to implement some substantive immunity from prosecution. Because there is no substantive immunity from federal criminal prosecution, no useful purpose would be served by creating a federal testimonial privilege broader in scope than the privilege against self-incrimination.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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NOVEMBER 1976.

MOTION FILED

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No. 76-179

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

LOUIS A. MARKERT,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

**MOTION OF THE NATIONAL CONFERENCE OF
STATE LEGISLATURES FOR LEAVE TO FILE A
BRIEF AMICUS CURIAE IN SUPPORT OF
PETITION NO. 76-179 AND BRIEF AMICUS
CURIAE IN SUPPORT OF CERTIORARI.**

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**MOTION OF NATIONAL CONFERENCE OF
STATE LEGISLATURES FOR LEAVE TO FILE A
BRIEF AMICUS CURIAE IN SUPPORT OF
PETITION NO. 76-179**

The National Conference of State Legislatures respectfully moves the Court for leave to file the accompanying brief in this case as amicus curiae. The consent of the attorneys for the parties herein has been obtained. The consent of the Solicitor General is transmitted herewith for filing with the clerk of this Court. The consent of the petitioner is being transmitted directly to the clerk of this Court by his attorneys.

This applicant is the only national organization created and funded by the nation's state legislatures, and among its primary concerns is the independence of all legislatures. The interests and concerns of this applicant are the implications and impact of the decision sought to be reviewed herein upon such independence and upon the rights and privileges secured by the several State Constitutions.

The Petition for Certiorari of the petitioner herein, which has but recently come to our attention, argues that the denial of recognition of the Illinois constitutional Speech or Debate provision creates a federal-state imbalance, but the discussion therein of this point is inadequate in that its concern is limited to one state, and one constitutional provision of that single state, whereas the interest of this applicant extends to the several states, and to the rights and privilege assured by the Constitutions of such several states. This applicant has no reason to believe that argument on this point will be made complete in this Court.

Wherefore, the National Conference of State Legislatures respectfully requests the Court to permit it to file the brief amicus curiae which is submitted herewith.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-179

LOUIS A. MARKERT,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

**BRIEF AMICUS CURIAE FOR NATIONAL
CONFERENCE OF STATE LEGISLATURES IN
SUPPORT OF CERTIORARI**

The National Conference of State Legislatures hereby submits its brief in support of the Petition filed in *Louis A. Markert, Petitioner v. United States of America*, No. 76-179, for writ of certiorari to review the judgment of the United States Court of Appeals on July 9, 1976.

OPINIONS BELOW

The Opinion of the United States District Court for the Northern District of Illinois, Eastern Division, in *United States v. Craig, et al*, No. 74 Cr. 877 is not officially reported but is printed in Markert Appendix (App. A, pp. 1-10). The first opinion of the United States Court of Appeals for the Seventh Circuit reversing the Order of Supression under the same title, No. 75-1592 of that Court, was entered on January 5, 1976, and is officially reported at 528 F.2d 773 and, also, is printed in Markert Appendix (App. B pp. 11-33).

Rehearing En Banc was granted by the Seventh Circuit. The second opinion of the United States Court of Appeals for the Seventh Circuit, again reversing the order of suppression was entered on July 9, 1976, and is not yet officially reported but is printed in Markert Appendix (App. C, pp. 34-36).

JURISDICTION

The first decision of the United States Court of Appeals was filed on January 5, 1976 (Markert App. B). The second decision of that Court was filed July 9, 1976 (Markert App. C). Markert's Petition was filed within 30 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(I).

QUESTIONS PRESENTED

Whether this Honorable Court should issue its Writ of Certiorari to review the action of the Court of Appeals in this most extraordinary case where (1) state constitutional rights and privileges — absolute within the boundaries of such states — are declared nullified by the existence of federal evidentiary rules; (2) five of the seven judges to consider this matter in the Northern District of Illinois and in the Seventh Circuit Court of Appeals were of the distinct opinion that the final result is erroneous; (3) federal-state balance would logically require recognition by the executive and judicial branches of the United States Government of state constitutionally granted rights and privileges — in complete harmony with the Constitution of the United States and for the most part fashioned after it; (4) the decision extant jeopardizes all state constitutionally granted rights and privileges; (5) the concept of co-existing dual sovereignties of equal dignity is imperiled.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 6, Clause 1, and Article 6, Clause 2, of the United States Constitution and Rule 26 of the Rules of Criminal Procedure (Title 18, U.S.C.A.) and Rule 501 of the Federal Rules of Evidence (Title 28, U.S.C.A.) are involved, and are set forth in Markert petition, pp. 4 and 5.

STATEMENT OF THE CASE

The statement of petition, Louis R. Markert at pp. 5 through 10 of his Petition includes a full analysis of the pertinent facts and of the decisions of the United States District Court for the Northern District of Illinois and of the United States Court of Appeals for the Seventh Circuit and in the interest of brevity, we adopt such Statement.

ARGUMENT

1. One of the functions of this applicant is to advise members of the legislatures of the several states on matters such as are involved in this case. In view of the divisive opinions of the Seventh Circuit and in view of this Court's opinions on the same subject as they relate to federal legislators, we deem it of extreme importance that this Court speak definitively in this area as to the rights of state legislators.

The Opinion of the first panel below held in substance that members of our Conference enjoyed the privileges of the constitutions of their own states on this subject. Subsequently, in a sharply divided opinion, the Seventh Circuit reversed its stand in an en banc hearing and its then position was that the matter of speech or debate so far as a state legislator was concerned was relegated to an evidentiary question in litigation in the federal courts. We cannot believe and earnestly beseech this Court that the Court of Appeals for the Seventh Circuit should not speak for the 48 states having such a provision in their State constitutions.

The National Conference of State Legislatures is particularly concerned that this case stands for a rule of law which undoubtedly will have a chilling effect upon the independence of state legislators. As the original panel of the United States Court of Appeals for the Seventh Circuit stated (Markert, App. 21):

"Although the speech or debate privilege embraces notions of the separation of powers among co-equal branches of government, its primary message is that legislatures must be able to discharge their lawful responsibility in an atmosphere free from the threat of interference by other governmental units. A legislator in considering whether to support or oppose a proposed law must be free to reflect on the merits; he must not be deterred from advocating a position by the threat of prosecution by a hostile executive. The evil is the fact of deterrence; whether the threat emanates from the local or national executive makes no difference."

"In the present case, the United States Attorney commendably conceded at the oral argument that a refusal to recognize a speech or debate privilege for state legislators would have an inhibiting effect on the conduct of members of the Illinois General Assembly. This threat to the legislature's independence is fundamentally inconsistent with the idea of legislative action reflected in the policy, purpose and history of the privilege and inherent in the words: 'for any Speech or Debate in either House, they shall not be questioned in any other Place,' U.S. Const. Art. 1 § 6."

It is important that we adequately advise our members. If, contrary to their understanding, they are prone to criminal liabilities because of the presence of the United States government as a sovereign — though not as to the presence of any other sovereign within the United States — they are entitled to be so advised. No doubt such advice would have not only a chilling effect upon incumbents, but would grievously limit the number of potential persons of legislative stature

who would be willing to seek office, and risk the misunderstanding or ambition of a federal prosecutor. Thus the position of our organization is more inclusive than that of the petitioner, Louis A. Markert, who stands before this Court.

2. Our examination of the civil cases appears to uphold this right of state legislators even in matters affecting civil rights.

Even with the civil rights exception to the common law immunity, no case exists where the exception was applied to a Legislator while acting in the legislative process. We refer the Court to its own decision in *Tenney v. Brandhove*, 341 U.S. 367, 376, where this Court applied, in the absence of a state constitutional protection (one of two states which has no Speech or Debate provision), the protection of the United States Constitution, from which it fashioned what it referred to as "common law" immunity. This appears to have been done to accommodate to the great majority of the states that fashioned their constitutions from the United States Constitution governing the same principle. However, in the presence of state constitutional provisions providing for speech or debate protection, the state provision has been recognized and enforced. *Fidtler v. Rundle*, 3 Cir., 497 F.2d 794, 798; *Doe v. McMillan*, 414 U.S. 306, 319. Cf. *Pearson v. Ray*, 386 U.S. 547. The few exceptions arise when the legislators go beyond the legislative process and into executive or judicial capacities. *Jordan v. Hutchinson*, 4 Cir., 323 F.2d 597, 599, 600 and cases cited therein pages 601-602.

Because civil rights violations usually have their counterpart in criminal proscriptions, it is felt that legislators should be able to rely upon the ongoing vitality of the state constitutions to protect them also against criminal prosecutions.

Our position that these authorities also protected against criminal proceedings within the scope of legislative activity

was bolstered by such cases as this Court's decision in *Johnson v. United States*, 383 U.S. 169, which in turn drew upon *Ex Parte Wason*, 4 QB 573, from which it quoted Mr. Justice Lush:

"I am clearly of the opinion that we ought not to allow it to be doubted for a moment that the motives or intentions of members of either House cannot be inquired into by criminal proceedings with respect to anything they may do or say in the House."

Further this Court in *Kilbourn v. Thompson*, 103 U.S. 168, drew upon *Coffin v. Coffin*, 4 Mass. 1, quoting:

"And I would define the article as securing to every member exemption from prosecution for everything said or done by him as a representative in the exercise of the functions of that office, without inquiring whether the exercise was regular, according to the rules of the House, or irregular and against those rules." (See 103 U.S. at page 203-4)

3. The question presented here is whether the rules of evidence in the federal courts are sufficient to overcome these constitutional protections. It is our understanding that if a state, any state, was admitted to the Union after 1789, the common laws as of the date of admission controls. *Logan v. United States*, 144 U.S. 263, at 303. We also recognize that these principles are not strictly followed. At times this Court has examined state laws of evidence, even if incorporated in the state constitution, in the light of "general authority and sound reason" rejecting them where they are antiquated or inappropriate. However, we did not believe that in the light of this Court's decisions, particularly in *Johnson* and *Brewster* (*United States v. Brewster*, 408 U.S. 501), it could be considered that a state constitutional protection had become either antiquated or inappropriate. Thus it has been our understanding that as the state legislatures are controlled by their own constitutions, equally are they protected by them.

The National Conference of State Legislatures, in substance, is of the opinion that the United States of America struck a bargain with the individual states as each was admitted into the Union. The United States of America accepted the state constitutions as written, had the power of rejection as to any individual clause, and when the United States accepted the constitutions of the several states, the United States was and is bound by the provisions of the constitutions of the several states. It is our respectful submission that this Court act upon and ratify that acceptance.

This case represents a giant step in the history of the United States and its relationship with the several sovereign states, and it endangers the parity envisioned by the Framers.

"The role of the states under the new federal constitution was also a central issue in the ratification debates. Opponents claimed that the new national government would soon engulf the states, eliminating all of their power and control over local affairs. See II Elliot's Debates, supra at 308 (New York), at 469 (Pennsylvania); III Elliot's Debates supra at 171 (Virginia). Yet in state after state speakers arose to assure their fellow delegates that the Constitution would work no such change; the states would remain an important unit of the government. See II Elliot's Debates, supra at 168 (Massachusetts), at 199 (Connecticut); IV Elliot's Debates, supra at 316 (South Carolina)."

(Markert Appendix 20, 1st Decision C.A.7)

4. The continuing incursion by broad Federal legislation into matters ordinarily of pure state interest has been a subject of recent concern (*National League of Cities v. Usery*, 44 LW 4974). We recognize, and appreciate, the attempts of this Court to curtail such incursion where it precipitates state-federal conflict. If these speech or debate privileges dictated by the state constitutions are absolute within the state — as we believe they are — the presence of the fed-

eral government may by the fact of presence alone — obliterate that absoluteness. It is imperative to our general interest that we be advised under the Supreme authority of this Court whether our several constitutional protections — none in conflict with the Supreme law of the land — may be successfully eroded by the mere presence of the federal prosecutor.

Our interests surpass the interest of Markert. If one of our guarantees is subject to erosion, all guarantees are in peril. Markert's interest is comparatively pedestrian. Our interests would encompass a re-examination of all constitutional guarantees which we have heretofore considered impregnable within the State, in the absence of a direct attack thereon. We consider the stability of the Constitutions of the fifty states we represent to be imperiled by the decision herein.

CONCLUSION

Wherefore, this applicant respectfully suggests the public interest will be best served by a definitive statement of this Court at the inception of federal incursion into state constitutionally protected areas at this time, and prays its Writ of Certiorari issue.

Respectfully Submitted

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Supreme Court, U. S.
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IN THE
Supreme Court of the United States
October Term, 1976

No. 76-179

LOUIS A. MARKERT,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

**BRIEF FOR AMICUS CURIAE LEGIS '50
IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI**

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IN THE
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**BRIEF FOR AMICUS CURIAE LEGIS '50
IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI**

I. INTRODUCTION

Petitioner LOUIS A. MARKERT (Markert) was indicted in a federal criminal proceeding that was based, in part, on testimony he gave before a federal Grand Jury concerning his activities as a member of the legislature of the state of Illinois. At the time of his testimony, Markert was unaware of the provisions of the Illinois Speech or Debate Clause¹

¹ That Clause states: "Except in cases of treason, felony or breach of peace, a member shall be privileged from arrest going to, during and returning from sessions of the General Assembly. A member shall not be held to answer before any other tribunal for any speech or debate, written or oral in either house. These immunities shall apply to committee and legislative commission proceedings." Art. 4, Sec. 12, Illinois Constitution, 1970.

and unwittingly failed to invoke the privilege provided therein. The present case arises out of his subsequent efforts to have his Grand Jury testimony barred.

The basic issues presented in this case are: whether the testimony of a state legislator concerning his activities in the legislature is privileged and must be excluded from a federal criminal proceeding; if such a privilege exists, whether it is based on federal common law or on state constitutional provisions; and, assuming its existence, whether the privilege can be waived by an individual legislator.

The record below is full of conflict. As noted in the Petition for Writ of Certiorari filed on August 7, 1976, the Federal District Court for the Northern District of Illinois, Eastern Division, held that the Illinois Constitution governed and that under its terms the evidence was inadmissible; it further held that Markert could not waive his privilege. A three-judge Court of Appeals for the Seventh Circuit reversed. It held that the Federal Rules of Evidence governed, that under the Rules, an evidentiary privilege based on federal common law existed, but that Markert had waived his privilege. Finally, the Seventh Circuit sitting en banc affirmed the three-judge court's decision but rejected its reasoning. In a decision that adopted the dissenting opinion filed by one of the members of the three-judge court, the en banc court ruled that federal common law does *not* extend an evidentiary privilege to a state legislator in a federal criminal case.

It is the position of amicus LEGIS '50 that this case presents important and novel issues of federalism that can only be resolved by this Court. Further, failure to resolve them will threaten the integrity of state legislatures in almost all of the states and could result in a diminution of the force of state constitutions. Should the Court grant cert,

LEGIS '50 will seek permission to argue the position that the constitutional relationship between the states and the United States requires federal courts to recognize and honor the Speech or Debate Clause of the Illinois Constitution. In order that this issue be fully and properly explored amicus urges the Court to grant Markert's petition.

II. INTEREST OF AMICUS

LEGIS '50 is a nonpartisan, not-for-profit citizens' organization formed in 1965, whose primary purpose and function is to improve the operations of state legislatures so that they will more fairly and effectively represent the interests and needs of the citizens of the states. Among its activities LEGIS '50 has and continues to perform surveys and analyses of the effectiveness of individual legislatures; to recommend specific changes and modifications in regard to the proceedings of individual legislatures; and to serve as a national source of expertise to both citizens and legislators concerned with reforming their state's legislature.

LEGIS '50's interest in the issues raised in this case is twofold: its goal of achieving more effective state legislatures can only be achieved if the integrity of the legislature is preserved by preventing incursions on the activities of state legislators when performing their legislative functions by other branches and other levels of government. Secondly, LEGIS '50's work in building strong legislatures requires that state constitutional provisions defining the powers and operations of the legislatures be given their full weight and authority by the federal courts. Through its intervention in this suit, LEGIS '50 hopes that it will be able to shed new light on these issues, informed by its practical knowledge of the day-to-day operations of the legislatures.

III. LEGAL ARGUMENT

A. The Decision of the Seventh Circuit Raises Important and Novel Issues of Federalism that Challenge the Integrity of State Constitutions.

By its refusal to give full force and effect to the Speech or Debate Clause of the Illinois Constitution, the Seventh Circuit has established a precedent that could effect almost all of the states. All but two of the states have clauses in their constitutions providing similar protection for their legislators, clauses that are now subject to the same interpretation. More importantly, if the Court of Appeals decision is allowed to stand, it will provide precedent for further encroachments on other state constitutional provisions. The Court of Appeals has held that a state constitutional provision that is not only in harmony with the federal constitution but is perfectly parallel to a provision contained therein, and whose purpose and ramifications go far beyond evidentiary procedure, has been preempted by a federal procedural rule providing in general terms for application of the federal common law of privilege in federal criminal proceedings. This holding represents a serious erosion of the principle that state constitutional provisions are valid unless clearly prohibited by the federal Constitution or *specifically* preempted by valid federal legislation. The erosion of that principle will permit wholesale disregard for state constitutional provisions that pose even a minor inconvenience to the administration of federal laws or of federal justice.

This is not merely a theoretical danger. In *Barrera v. Wheeler*, 475 F2d 1338 (8th Cir. 1973) the Eighth Circuit gave a similarly cavalier treatment to a state constitution. It held that federal funds channeled through the states under the Elementary and Secondary Education Act of 1965 were not subject to a Missouri constitutional provision limiting

education expenditures to public schools, despite a clearly evidenced Congressional intent to accommodate state law in the administration of those funds. This Court reversed *Wheeler v. Barrera*, 417 U.S. 402 (1973). The *Barrera* case and the present case show that the lower federal courts are strongly inclined to subordinate state law when its application would have any impact at all on the administration of federal law. This Court should articulate standards for determining when such subordination is justified.

The *Markert* case raises issues as central to the definition of the proper roles of our various levels of government as those which were raised in *National League of Cities v. Usery*, 96, S.Ct. 2465 (1976), decided last term. There, this Court held that the Tenth Amendment constituted an affirmative limitation on the exercise by the federal government of even those powers explicitly conferred on it by the federal Constitution. The limits were drawn to preserve "the States' freedom to structure integral operation in areas of traditional government functions." *National League of Cities*, *supra*, at p. 2475. The area of state government directly affected by the curtailment of the Speech or Debate Clause privilege, the area of a legislator's activity on the floor of the state legislature, is preeminently a state domain. Further, the federal intervention supported by the Seventh Circuit is based not on authority explicitly conferred by the U.S. Constitution, but on powers derived by implication.

Even before *National League of Cities*, the federal courts were often careful in criminal and civil federal question cases to identify any countervailing state interests before mechanically applying the federal common law of privilege. See *Garner v. Wolfinbarger*, 430 F2d 1093 (5th Cir. 1970); *Baird v. Koerner*, 279 F2d 623 (9th Cir. 1960); *Boyd v. Gullet*, 64 FRD 169 (D. Md. 1974) (which takes note of

Proposed Rule 501). In these cases the courts adopted a balancing approach: where the state policy interest was significantly stronger than the federal, state evidentiary rules were applied. *Baird v. Koerner*, *supra*. However, the results of such balancing were not consistent or uniform. And that approach is now outdated. This Court's holding in *National League of Cities* requires that the balancing approach be replaced by an approach that guarantees absolute protection to state constitutional provisions relating to core state activities.

In summary, it is clear that the *Markert* case presents important and novel issues of federalism. Where important questions concerning the relationship between branches of federal and state governments depend for their resolution on the construction of a federal statute, this Court has frequently granted certiorari to render a definitive construction. See *Leiter Minerals v. U.S.*, 352 U.S. 220 (1957). Where, as here, the issues presented are questions of first impression involving the construction of federal statutes, the Court has traditionally given them priority consideration. See *American Federation of Musicians v. Wittstein*, 379 U.S. 171 (1964).

The constitutional and statutory question raised by this case is an important one: What consideration is due by a federal court to state constitutional provisions which have incidental effects on the operation of federal court procedures? The Court has never previously addressed this issue. In *Tenney v. Brandhove*, 341 U.S. 367, it held that the "official privilege" available at common law protected a state legislator from inquiry into his legislative activities. But it has never considered whether that common law doctrine need be reached where a state constitution has clearly articulated the privilege. That issue is clearly presented to the Court by the Petitioner and should be addressed.

B. The Decision of the Seventh Circuit Raises Important Issues Concerning the Federal Administration of the Criminal Law.

1. This case raises an important issue concerning federal criminal procedure: whether a state constitutional provision or the federal common law defines evidentiary privilege. The history of the case in the courts below has clouded that issue. The District Court assumed without argument that the Illinois Speech or Debate privilege applied in the federal criminal proceeding. This assumption was rejected by the three-judge Court of Appeals and by the court sitting en banc; however each of the latter reached different and conflicting interpretations of the law. In the final decision, the Chief Judge for the circuit took the same position as had the District Court. This tortured course indicates that the dominance of federal common law over state constitutional privileges is not nearly as self-evident as the Seventh Circuit suggests.

This conflict makes it imperative for this Court to clarify the scope of Rule 501 and particularly the extent to which it contravenes the highest expression of state policy. *Calhoon v. Harvey*, 379 U.S. 134. The U.S. Supreme Court bears the ultimate responsibility for the fair and uniform application of procedural rules throughout the federal court system, and has a special responsibility to insure the fair and uniform administration of criminal justice. In *Marshall v. U.S.*, 360 U.S. 310, 313 (1959) the Court granted cert in order to "... exercise ... our supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts." In *McNabb v. U.S.*, 318 U.S. 332 (1943) the Court noted that "... this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions."² Where those

² Although *McNabb* was decided before the statutory certification of the common law rules of evidence, its motivation is still valid.

rules are unclear or incorrectly interpreted, as here, it is particularly appropriate for the Supreme Court to render a statement on the matter.

2. This case may also raise a question of waiver of an evidentiary privilege, an issue central to the fair administration of the criminal law. Should this Court hold that the Speech or Debate privilege extends to this Petitioner it will be called upon to resolve an issue of comparable importance: Is the Speech or Debate privilege set out in the federal and state constitutions an absolute proscription or a personal privilege which may be waived, and, if it is personal, may it unknowingly be waived?

This Court, has repeatedly recognized the threat to Constitutional rights posed by too liberal a construction of the waiver doctrine; it has agreed to hear a large number of cases involving alleged waiver of privilege under a great variety of circumstances. Throughout its consideration of those cases, it has evolved a coherent set of rules governing waiver of the privilege against self-incrimination. See *Johnston v. Zerbst*, 304 U.S. 458 (1938); *Miranda v. Arizona*, 384 U.S. 436 (1966). The Court has also heard cases involving the privilege imbedded in the Speech or Debate Clause, *U.S. v. Johnson*, 383 U.S. 169 (1963); *Gravel v. U.S.*, 408 U.S. 622 n.13 (1971), but it has never specifically addressed the issue of waiver by a legislator of his own privilege.

Amicus curiae submits that particularly in view of the conflict in the decisions rendered below in this case, the issue is ripe for consideration. Although the Speech or Debate privilege is invoked less frequently than is the Fifth Amendment privilege, it is of similar importance in the American judicial system. The requirements for waiving it should be clearly articulated.

C. Petitioner Markert Has Not Waived His Speech or Debate Privilege.

It has been suggested that the Court should not grant cert in this case because the issue concerning the existence of an evidentiary privilege running to a state legislator in a federal criminal trial is an academic one; if Markert had such a privilege he waived it. The District Court disagreed with this position and so does this amicus. Amicus contends that there is compelling precedent for holding that Markert could not waive his privilege even had he intended to do so.

In *U.S. v. Johnson*, 383 U.S. 169 (1966), this Court reviewed the conviction under a federal conflict of interest statute of a U.S. Congressman found to have conspired to make a speech for compensation on the floor of the House of Representatives. The Court held that "a prosecution under a general criminal statute dependent on such inquiry (into the motives underlying a speech on the floor of Congress) necessarily contravenes the Speech or Debate Clause." *Johnson, supra* at 173.

The Court never explicitly addressed the issue of waiver, but since its holding constitutes a general proscription of criminal prosecution based on evidence obtained in contravention of the Speech or Debate Clause, it follows that the only way the privilege could possibly be waived would be as a practical matter through failure to raise it at any stage of the proceedings.

Further, the Court of Appeals opinion affirmed by the Supreme Court in *Johnson* indicates that the Court considered itself deprived by the Speech or Debate Clause of jurisdiction to try Johnson, *U.S. v. Johnson*, 337 F2d 180, 186 (4th Cir. 1964). A court without jurisdiction has no power to try a defendant, no matter what he does or fails to do procedurally; lack of subject matter jurisdiction cannot

be waived at any stage of the proceedings. The Court of Appeals cites a number of other decisions holding similar evidence "absolutely privileged" and emphasizing that "the privilege belongs to Congress and was developed for the benefit of Congress as a whole." *Johnson, supra* at 190.

Since the Illinois Speech or Debate Clause is substantially identical to the federal clause construed in *Johnson*, it is reasonable to assume that its scope was intended to be equally broad. If a federal court is bound to honor the Illinois Speech or Debate privilege at all it must give it as liberal a construction as it would the federal privilege and must find that it has not been waived and cannot be waived by the petitioner in this case.

CONCLUSION

LEGIS '50 respectfully submits that the question of whether state legislators possess an evidentiary privilege protecting statements made in or relating to the performance of their legislative duties from introduction in federal criminal proceedings is of central importance to the operation of the fifty state legislatures. Of equal importance is the question of the weight to be accorded a state constitutional provision that conflicts with a reading of federal common law. It is the position of this amicus that, contrary to the decision reached by the Seventh Circuit, an evidentiary privilege does exist that is based on the state constitution and that privilege cannot be waived by an individual legislator. Because of the importance and novelty of the questions presented, the Court should act to remove the ambiguity created by the decisions below and should further delineate the protection accorded by the Tenth Amendment to the states when performing an integral state function.

Under the doctrine set forth in *NLC v. Usery* this Court should acknowledge that the activities of the state legislature are among the most basic and central of all state functions and that a state constitutional provision pertaining to them is of greater weight than federal common law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of November, 1976, three copies of this Brief for Amicus Curiae LEGIS '50 in Support of Petition for Writ of Certiorari were mailed, with adequate first class postage prepaid, to Solicitor General Robert Bork, Department of Justice, Washington, D.C. 20530; and to Anna R. Lavin and Edward J. Calihan, Jr., attorneys for Petitioner, at their law offices located at 53 West Jackson Boulevard, Chicago, Illinois 60604.

I further certify that all parties required to be served have been served.

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